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IN THE

Supreme Court of the United States

October Term, [redacted] 1970

No. [redacted] 166

ALVIN C. MOYER and JACOB E. MOYER, d/b/a MOYER BROTHERS,

Petitioners,

vs.

UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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October Term, 1969

No. .....

ALVIN C. MOYER and JACOB E. MOYER, d/b/a MOYER BROTHERS,

Petitioners,

vs.

UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Alvin C. Moyer prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit entered at No. 17,922 on January 9, 1970, on the Appeal of Alvin C. Moyer from the Order of the United States District Court for the Western District of Pennsylvania at No. 67-406 Civil Action entered on the 6th day of June, 1968, and the Judgment Order entered in such Action on February 13, 1969.

There are special and important reasons for the granting of the Writ prayed for because by affirming the Memorandum Opinion of the District Court the Court of Appeals

has decided an important question of Federal Law which has not been but should be settled by this Honorable Court, respecting the interpretation of the provisions of the form of Offer in Compromise commonly used by Internal Revenue Service of the Treasury Department of the United States whereby the "proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, * * * and for 1 year thereafter," with such Court of Appeals deciding the question involved therein as to what is meant by the wording in such form of Offer "the suspension of the running of the statutory period of limitations on * * * collection" in a manner in conflict with the reasoning of this Honorable Court in its decision in *United States v. Updike*, 281 U. S. 489, 50 S. C. 367 (1930) and the plain intent of Congress in the use of such words in the Internal Revenue Codes of 1954 and 1939 and in prior Revenue Acts.

Opinions Below

The Opinion of the Court of Appeals for the Third Circuit (App. *infra* pp. 63-64) is reported in 420 F. 2d 375 (1970). The Memorandum Opinion of the District Court (App. pp. 66-69) does not appear to have been reported in the Federal Supplement Reporter.

Jurisdiction

The Judgment of the Court of Appeals was entered January 9, 1970 (App. p. 65).

On March 25, 1970, the Honorable William J. Brennan, Jr., Associate Justice of this Honorable Court, ordered

that the time for filing a Petition for Writ of Certiorari in this cause be extended to and including May 15, 1970.

The statutory provision believed to confer on this Court jurisdiction to review the Judgment in question by Writ of Certiorari is Title 28, U. S. C. Section 2101.

Question Presented

Did the Court of Appeals err in affirming the District Court in its concluding (App. p. 67) that the "terms of the waiver [Paragraph 6 of the Offer] are clearly susceptible to only one interpretation, giving validity to the plaintiff's method of computing the period of collection," and in holding that "the Government's action to reduce to judgment certain taxes, penalties and interest was not barred by the statute of limitations because the running of the limitations period was suspended by the appellant taxpayer's submission of an offer in compromise for the period during which the offer was pending and for 1 year thereafter" (App. pp. 63-64), and in failing to conclude in its interpretation of Paragraph 6 of the Offer that in such Taxpayer's *waiving* "the benefit of any statute of limitations applicable to the * * * collection" of the assessed liability and *agreeing* "to the suspension of the running of the statutory period of limitations on * * * collection for the period during which this offer is pending, * * * and for 1 year thereafter", Congress in its use of the term "the suspension of the running of the statutory period of limitations" in the various Internal Revenue Acts from that of 1926 through 1938 and in the Internal Revenue Codes of 1939 and 1954 had reference to the *suspension of a date* in *the extent of time*, namely, the *expiration date* of the statutory limitation, and *not* to *an extension* of *a portion or part* of a *period of time*, and that applying such

intent of Congress to such provision in the Offer, the Government lost its right at various dates prior to March 30, 1967, the date of the entry of suit herein, to enter suit on all of the assessment of taxes here involved?

Statutes and Regulations Involved

Section 6502 of the Internal Revenue Code of 1954 governing collection after the assessment and Regulations 301.6502-1 thereunder are set forth in part in the Appendix (*infra*, p. 72).

Section 6503 of the Internal Revenue Code of 1954, providing for suspension of running of period of limitation, and Regulations 301.6503(a)-1 thereunder are set forth in part in the Appendix (*infra*, pp. 73, 74).

Statement of the Case

(a) Nature of the Proceeding

This Civil Action was brought in the District Court for the Western District of Pennsylvania with the authorization and at the request of the Chief Counsel of Internal Revenue Service and at the direction of the Attorney General of the United States in accordance with Section 7401 of the Internal Revenue Code of 1954, to reduce to personal judgment certain withholding, social security and unemployment taxes assessed by the Commissioner of Internal Revenue for various periods from 1957 through 1960, inclusive, in the amount of approximately $390,000 (R. 4a-7a, 11a-12a).[1] The Complaint was filed against Alvin C. Moyer (hereinafter sometimes termed Petitioner) and Jacob E. Moyer, d/b/a Moyer Brothers, on March 30,

[1] R. references are to the separately bound record appendix filed in the Court of Appeals.

1967 (R. 4a-7a). A Separate Answer was filed by Alvin C. Moyer (R. 7a-10a). An Amendment to Complaint was filed on August 25, 1967 (R. 11a-12a), with a Separate Answer of Alvin C. Moyer thereto being filed on September 5, 1967 (R. 13a-14a). A Stipulation of Facts and Issue was filed on November 9, 1967 (R. 14a-21a). A Supplemental Stipulation of Fact was filed January 5, 1968 (R. 23a-25a). Counsel for the parties stipulated that the taxes involved were timely assessed in the correct amounts.

A Motion for Summary Judgment was filed by the United States on November 27, 1967, to reduce to personal judgment the taxes, penalties and interest involved in this action (R. 3a). A hearing on such Motion was had on March 1, 1968 (R. 3a). On June 6, 1968, the District Court granted the Motion in a "Memorandum" opinion and Order (R. 3a, 27a-31a). On February 13, 1969, a Judgment Order was entered thereon in favor of the Government against the Defendants for $624,473.09 and costs with interest on the Judgment from June 6, 1968 (R. 3a, 32a-33a).

A Notice of Appeal from such Judgment Order and final Judgment entered thereon was filed April 11, 1969, in the Court of Appeals for the Third Circuit (R. 33a-34a). The Opinion of the Court of Appeals and Judgment affirming the Order of the District Court were filed on January 9, 1970 (App. pp. 63-65).

There are appended hereto copies of the Memorandum opinion and Order of the District Court entered on June 6, 1968, the Judgment Order entered by that Court on February 13, 1969, and the Opinion of the Court of Appeals and its Judgment entered on January 9, 1970 (App. pp. 63-71).

(b) Statement of the Facts

An Offer in Compromise was filed with Internal Revenue Service on June 21, 1960, by Moyer Brothers over the signature of A. C. Moyer (R. 17a). This was amended October 26, 1960, to include Defendant J. E. Moyer as a proponent thereof (R. 18a). An Offer in Compromise was filed with Internal Revenue Service on July 5, 1960, by Moyer Brothers over the signature of A. C. Moyer (R. 25a).

Each Offer was on Form 656 (Rev. 7-57) and contained the same printed matter. Paragraph 6 of each Offer provided:

> "6. The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations or assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter."

Said Offers in Compromise were rejected by letter dated March 20, 1962, from the District Director of Internal Revenue, Philadelphia, Pennsylvania, addressed to A. C. Moyer, J. E. Moyer (R. 19a).

Tax Collection Waivers Form 900 were executed by Defendant Alvin C. Moyer on July 16, 1966, and on October 12, 1966 (R. 20a, 21a).

Paragraph VI of the Complaint alleged (R. 6a):

> "This action is timely as to defendant Alvin C. Moyer as the six year statutory period for the commencement of suit provided for in Section 6502(a)(1), Internal Revenue Code of 1954 has been suspended or extended pursuant to Section 6502(a)(2) of the Code, as follows:

"(a) A waiver suspending the statue of limitations for collection is a part of an offer in compromise filed with the Internal Revenue Service by defendant Alvin C. Moyer on July 5, 1960, and rejected by a letter dated March 20, 1962.

"(b) Tax collection waivers Form 900 were executed by defendant Alvin C. Moyer on July 16, 1966 and on October 12, 1966."

Paragraph 6 of Defendant Alvin C. Moyer's Separate Answer made answer to such allegations of the Complaint and appears at R. 8a-10a.

Paragraphs 14 and 15 of the Stipulation of Facts (R. 15a) provided:

"14. If collection of the taxes was barred by the statute of limitations on July 16, 1966, the date of the earliest waiver, the waivers referred to as Exhibits E-1 and E-2 are invalid and have no effect.

"15. If the collection of the taxes was not barred by the statute of limitations on July 16, 1966, the effect of the waiver referred to as Exhibit E-1 was to extend the statutory time for collection to December 31, 1966, and the effect of the waiver referred to as Exhibit E-2 was to extend the time for collection further to March 31, 1967."

Preliminary Statement

This suit involves an interpretation of a so-called Tax Collection "Waiver" of the statute of limitations applicable to the collection of the liability sought to be compromised, such "Waiver" being paragraph 6 of the printed form of the Offers in Compromise filed by the taxpayers (*supra*, p. 6), and in common use by the Government for many years.

Absent any "Waiver" of the statute, an action to collect the amount of the earliest assessments here involved could

not have been filed after November 22, 1963, as the 6-year statute of limitation would have expired on that date.

Were it *not* for the filing of the offers in compromise and the inclusion therein of the to-be-interpreted "waiver" and "agreement" as to "the suspension of the running of the statutory period of limitations on * * * collection," the 6-year statutory limitation after the assessment of each of the items of taxes involved in this case for the collection thereof *would have expired* at various times *before* the *entry of the suit herein on* March 30, 1967, ranging from 3 years, 4 months and 8 days *as to the earliest assessment*, made November 22, 1957, *down* to 9 months and 27 days as to the last assessment made on June 3, 1960.

Without any reference whatever to such "waiver" and "agreement," *at the date of the rejection of the offer* the Government still had *from a minimum* of 1 year, 8 months and 2 days *on the earliest of the assessments to a maximum* of 4 years, 2 months and 13 days *on the last of the assessments* of the 6-year limitation after assessment fixed by the statute for the beginning of a proceeding in court for the collection of such taxes.

Even *one year after* the *rejection of the offer* on March 20, 1962, it still had *from* 8 months and 2 days *on the earliest of the assessments* to 3 years, 2 months and 14 days *on the latest* thereof of the 6-year limitation for the beginning of such a proceeding.

It has been stipulated that if the collection of the taxes here involved was *not* barred by the statute of limitations on July 16, 1966, the date the earlier (R. 20a) of the two tax collection waivers Form 900 was executed, the effect of such waivers (R. 20a, 21a) was to extend the statutory limitation for collection as to Alvin C. Moyer to March 31, 1967, *one day after* the commencement of this suit (R. 15a).

Reasons for Granting the Writ

The position of Petitioner Alvin C. Moyer is that on the date of the commencement of this action on March 30, 1967, the 6 years' time after the assessments of each of the taxes, penalties and interest set forth in Paragraph V of the Complaint for commencement of suit as provided in Section 6502(a)(1) of the Internal Revenue Code of 1954 (26 U. S. C. A.) had expired at the end of 6 years from the respective assessment dates of each of such taxes, penalties and assessed interest, and thus before March 30, 1967, with such limitation being unaffected by the "waiver" referred to in Subparagraph (a) of Paragraph VI of the Complaint. The reasoning in support of this position may briefly be stated as follows:

Paragraph 6th of the Offer in Compromise submitted provided:

> "6. The undersigned proponent *waives the benefit* of *any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised*, and *agrees* to the *suspension* of *the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending*, or the period during which any installment remains unpaid, *and for 1 year thereafter*" (Italics supplied).

The only "benefit" of "any statute of limitations" (the 6-year *extent* of time) to collect which the proponent could "waive" was the *expiration* of such 6-year extent of time, because *neither* the proponent *alone* nor *jointly with the Commissioner* could take *any action whatever to change* the *Commissioner's rights within* such 6 years. During that time *all rights* in and *benefits* of and from the statute of limitations *belonged to the Commissioner.* These rights and benefits were fixed *by statute* and *were unchangeable.*

Beyond such 6 years *all rights* in and *benefits* of and from the statute of limitations *belonged to the proponents* and *to them alone*. Thus, the proponents' *agreeing* to "the suspension of *the running* of the statutory period of limitations on collection" *had* and could only have to do with *their agreeing* to "waive" a "benefit" which but for such "waiver" they would *retain* and which "benefit" could *only* be *in the expiration* "of the statutory period of limitations," so that proponents' agreeing in the offer in compromise to the "*suspension* of the *running of the statutory period of limitations*," could only have reference to the *suspension* of the *expiration date* of the statutory period of limitations (6 years from 11-22-57 in the case of the earliest assessment described in the Complaint, namely, November 22, 1963) "for the period during which this offer is pending, * * * and for 1 year thereafter." "This offer" was pending from June 21, 1960, to the date of its rejection on March 20, 1962, which latter date was well within the 6-year limitation. Adding to this March 20, 1962, date the "1 year thereafter" provided for in paragraph 6th of the offer carried the date over to March 20, 1963, which was still *within* the 6-year limitation for collection by suit provided by the statute. Thus as to this item of the assessed taxes the statute of limitations on the Government's right to enter this suit *expired on November 22, 1963*. Applying the same reasoning to all the other assessments involved in this suit, the last of which was made on June 3, 1960, the Government also lost its rights to so enter suit at various dates prior to March 30, 1967, the date of the entry of suit herein.

Petitioner, Alvin C. Moyer's position, in short, is that in providing in the various revenue acts and the two Internal Revenue Codes of 1939 and 1954 that "the running of the statute of limitations shall be suspended" Congress

had reference to the *suspension of a date* in *the extent of time* and *not* to an *extension* of *a portion or part of a period of time*. Cases and authorities hereinafter cited and quoted from unequivocally support this position.

The Government's position on the statute of limitations in the Courts below was that in determining the "period" of limitation for the entry of the instant action, under paragraph 6 of the Offer in Compromise there must be *added* to the full 6-year "period" for collection by suit allowed by the statute after the date of each assessment the *years, months and days* elapsing *from the date of the filing* of the Offer in Compromise *to the date of its rejection*, namely, 1 year, 8 months and 29 days, *plus* the further "1 year thereafter" provided in such paragraph 6th of the Offer, or a total *extension* of the statutory "period" of limitation of 2 years, 8 months and 29 days, and that applying this reasoning, for example, to the assessment of 11-22-57 above referred to, the "statute tolling date" for the entry of this suit on said assessment would have been August 21, 1966, which date, because of the so-called Tax Collection Waivers, Form 900, executed by Petitioner Alvin C. Moyer on July 16, 1966, and October 12, 1966, and filed with I. R. S. would then have been *further extended* to March 31, 1967, or *one day after* the *filing* of the Complaint in this suit; with the same reasoning applying to all the other assessments set forth in the Complaint. Not only has this Court rejected such reasoning, with at least one Federal Court of Appeals terming it "absurd," but Committees of Congress over the years, and including declarations thereof as late as the Fall of 1966, have by their statements clearly shown that any such reasoning was *never* the *intent of Congress*, all as hereinafter set forth.

But ignoring completely such determinations of this Court and other courts and Committees of Congress to

the contrary, and *without even any reference to any of the decisions relied upon by the Government* and in utter disregard of the plain provisions of the offer form, the District Court concluded (App. *infra*, p. 69) "The terms of the waiver are clearly susceptible to only one interpretation, giving validity to the plaintiff's method of computing the period of collection, and this action is timely brought under the provisions of 26 U. S. C. A., Sec. 6502(a)(2) * * *," on review of which the Court of Appeals found no error "for the reasons so well stated in the Memorandum Opinion" (App. *infra*, p. 64).

Each Offer in Compromise was on Form 656 (Rev. 7-57) and contained the same printed matter (R. 17a, 18a, 25a). Each of the froms filed stated that the amount offered was "tendered voluntarily with the request that it be accepted in compromise" of the described liability.

Under paragraph numbered 3 of the printed portion of the offer form it was provided that "In making this offer, and as a part consideration thereof," the proponent *agrees* "(a) that all payments and other credits heretofore made to the account(s) for the period(s) covered by this offer *shall be retained by the United States;*" and "(b) that any and all amounts of money to which the proponent may be entitled under the internal revenue laws, due through overpayments of any tax or other liability, including interest and penalties, made for periods ending prior to or during the calendar year in which this offer *is accepted*," as are not in excess of the difference between the liability sought to be compromised and the amount herein offered, "*shall also be retained by the United States*", and that "Any such refund received after the filing of this offer will be returned immediately to the office of the District Director" (Italics supplied). We are not concerned with

any part of this paragraph of the offer form as having any bearing upon the question involved, but it clearly shows an intent upon the part of the proponent to give to the Commissioner of Internal Revenue *upon acceptance of the offer* rights which otherwise he might not have, *without in any way adversely changing his* (the Commissioner's) *existing rights at the time of the submission of the offer.*

The provisions of the paragraph numbered 4 in the offer form as to matters and things "further agreed" to by the proponent were *entirely* contingent "upon notice to the proponent *of the acceptance of this offer* in compromise" (Italics supplied).

Up to this point in the printed form of offer it is plainly seen that the only way the rights of *either* the proponent or the Commissioner could be affected *favorably* or *adversely* was through *the acceptance of the offer.*

Under paragraph numbered 5 of the offer form the "grounds for acceptance of this offer" were to be set forth, while under the paragraph numbered 7 it was "understood" that the offer "will be considered and acted upon in due course" and that "it does not afford relief from the liability sought to be compromised" *unless and until* "it is actually accepted in writing by the Commissioner or his duly authorized representative", and "the terms of the offer have been fully complied with."

Throughout all of these paragraphs it is plainly to be seen that the only way the rights of either the proponent or the Commissioner could be affected favorably or adversely was *through acceptance of the offer.* Since the offer was rejected (Ex. D-2, R. 19a), we need not concern ourselves with any of the above-quoted provisions.

Paragraph 6 of the *offer form*, however, was *in no way conditioned upon acceptance of the offer.*[2] There the proponent "*waives*" *the* "*benefit*" of "any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised" and "*agrees*" to the "suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending," or the period during which any installment remains unpaid, "and for 1 year thereafter." The "statute of limitations" was six years from the date on which each of the tax, interest and penalty items herein involved was assessed. During that six-year "extent of time" the proponent had *no* "*benefit*" in the "statute of limitations" at all. All *rights* and *benefits* in that six-year "extent of time" belonged to the Commissioner of Internal Revenue *absolutely*. The only "*benefit*" the proponent could have in the "statute of limitations" was *in the expiration* thereof. It was only as to *that date* that the proponent could waive any "*benefit*". On the other hand, the Commissioner was *powerless* under the law to do anything to reduce or *otherwise adversely affect* the six-year "extent of time" limitation either by agreement with the proponent or voluntarily on his own part. That *extent of time* was *fixed by statute* and *was unchangeable*. Since the only "*benefit*" which the *proponent* had in the "statute of limitations" at the time of the submission of the offer was in its "expiration", *that* was *the only* "*benefit*" he could "waive" in the offer, and thus it is plain that his agreeing to "the suspension of the running of the statutory period of limitations" had only to do with *the suspension* of the *expiration date* of the statute, which *expiration date* was held in suspension "for the period during which this offer is pending, * * * and for 1 year there-

[2] The District Court *erroneously* stated the defendants contended otherwise (App. p. 67).

after." Any other interpretation of the specific words of the offer gives to such words a meaning plainly *never intended by the Commissioner of Internal Revenue, as shown and reiterated by his own regulations*, hereinafter commented upon.

With respect to the statement appearing at the bottom of the offer form that "Waiver of statutory period of limitations is hereby accepted by the undersigned" [the District Director of Internal Revenue], to argue that the Commissioner of Internal Revenue by his use of these words with dealing with anything other than the *expiration date* of the 6-year period here involved is to say that the Commissioner, or his District Director, by the signing of the paragraph above quoted *could change* the 6-year "period" of the statute. It cannot seriously be contended that *either had any such right*. All the Commissioner or his Director was doing was accepting the proponent's declaration that he, the proponent, would not *hold against* the Commissioner the *expiration date* of the statute if during the time the offer was pending (and irrespective as to how long it took the Commissioner to pass upon the offer) such *expiration date* arrived, and that the *expiration* of the Commissioner's rights to collect by distraint or by proceeding in court would be *suspended* during that time and for 1 year thereafter. *Any other interpretation of this* "acceptance" by the Commissioner or his Director of the "waiver" of the statutory "period" of limitations by the proponent could bring about the *reduction* of the 6-year period, which would be contrary to the specific provisions of the statute. To illustrate, we will deal with the earliest of the assessments here which was made November 22, 1957, on which the 6-year limitation would have expired on November 22, 1963. The offer was filed June 21, 1960, and was pending until rejected

on March 20, 1962. Adding 1 year thereto would carry this date over to March 20, 1963. Under the theory that the 6-year "period" *can be changed* by action of the proponent with the Commissioner, he would then have had only until March 20, 1963, within which to bring an action for the collection of the tax-liability sought to be compromised. Thus, under such theory, the statute of limitations to collect by distraint or proceeding in court would be *reduced* from 6 years to 5 years, 3 months and 28 days! That it was never the intent in any way to affect the *Commissioner's rights* during the 6-year "period" and that all he was dealing with in *his* form of offer in compromise in his providing for the proponent's *waiving* the "*benefit*" of the statute of limitations and *agreeing* to the suspension of the running of the statute and in his [the Commissioner's] accepting the proponent's "waiver of statutory period of limitations" was the *expiration date* of such "statutory period," is clearly shown by the several revenue acts, the 1939 and 1954 Internal Revenue Codes and the Commissioner's regulations thereunder, and the various statements of Congressional Committee Reports hereinafter dealt with.

In a 45 page Addendum bound separately but filed with Appellant's Brief in the Court of Appeals there was set forth various provisions of the Internal Revenue Acts beginning with that of 1918 and carrying through certain of such Acts and the Internal Revenue Codes of 1939 and 1954, with amendments thereto, as well as certain of the Regulations of the Commissioner of Internal Revenue under such Acts and Codes and certain statements and comments appearing in various Congressional Committee Reports pertaining to certain of such Acts and Codes, all showing the development of the provisions covering the assessment of Internal Revenue taxes and *the collection*

thereof by suit over a long number of years and right on up to 1966. From all of these data it is plainly to be seen that *nowhere* is there *any support* for the theory of the law advanced by the Government and sanctioned by the Courts below in this case in their conclusion with respect to the phrase "Suspension of running of the statute of limitations" and *every support* for that advanced by the petitioner Alvin C. Moyer.

The *Revenue Act of 1924* created the Board of Tax Appeals, and under Section 274(a) thereof provided for the right of an appeal to such Board by the taxpayer where the Commissioner determined a deficiency, of which he was required to notify the taxpayer by registered mail. Such deficiency could be assessed only as "hereinafter provided" in the Act, which provisions were set out in detail in the balance of Section 274.

Section 277 of the Act provided for the "Period of Limitation upon Assessment and Collection of Tax." Subdivision (a) thereof provided, *inter alia*, "Except as provided in Section 278 and in subdivision (b) of Section 274 and in subdivision (b) of Section 279", the amount of income, excess-profits, and war-profits taxes imposed by the Revenue Act of 1921, and by such Act as amended, for the taxable year 1921 and succeeding taxable years, and the amount of income taxes imposed by the Act of 1924, "shall be *assessed within four* years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after *the expiration* of *such period*"; and that the amount of income, etc., taxes imposed by the various prior Revenue Acts from 1909 through 1918 and by any such Act as Amended, " shall be *assessed within five* years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after *the expiration* of *such period*."

Subdivision (b) thereof provided:

> "The *period within which an assessment is required* to be made by subdivision (a) of this section in respect of any deficiency *shall be extended* (1) by *60 days* if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and *no appeal* has been filed with the Board of Tax Appeals, or, (2) *if an appeal* has been filed, then by the *number of days between* the *date of* the *mailing* of *such notice and* the *date* of the *final decision by the Board*" (Italics supplied).

Thus, the Act of 1924 *provided in unmistakeable terms* for an *extension* of the "*period* within which *an assessment is required* to be made" under subdivision (a) of Section 277 *by 60 days* if a notice of deficiency had been mailed to the taxpayer under subdivision (a) of Section 274 and *no appeal* had been filed with the Board, or *if an appeal* had been filed, "then by the *number of days between* the *date* of the *mailing* of *such notice and* the *date* of the *final decision* by *the Board*."

Section 278 (c) of the *Revenue Act of 1924* provided, *inter alia*, that where "*both* the Commissioner and the taxpayer *have consented* in writing to *the assessment* of the tax *after the time* prescribed in section 277 *for its assessment* the tax may be assessed at any time *prior to the expiration of the period* agreed upon" (Italics supplied).

Section 278 (d) of the Act of 1924 provided:

> "Where the *assessment* of the tax is made *within the period prescribed* in section 277 *or in this section*, such tax may be collected *by distraint* or *by a proceeding in court, begun within six years after* the *assessment* of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made" (Italics supplied).

Article 1271 of the Commissioner's *Regulations 65* under *the Act of 1924* spelled out the provisions of Section 277 (a) covering the general rule *as to assessments* for the several years specified, within four years and five years "after the return was filed" and the various exceptions to such general rule. In connection with *the exception* where a notice of deficiency had been mailed to the taxpayer under section 274(a) of the statute and no appeal had been filed, the Regulations provided, then "the period" (the four-year or the five-year period, as the case may be) in which "the assessment may *under ordinary circumstances* be made *shall be extended* by 60 days, or, if *an appeal* has been *filed, such period shall be extended by* the *number of days between* the *date* of the *mailing* of the notice of deficiency and the *date* of the *final decision of the Board*" (Italics supplied).

Subdivision (6) of said *Article 1271* provided that if the Commissioner and the taxpayer *consent in writing* to the assessment of the tax "*after the expiration*" of the four- and five-year periods prescribed by section 277(a) "as the period in which the assessment of the tax *must* be made", the tax may be assessed at any time "prior to *the expiration* of *the period* agreed upon."

Article 1272 of *Regulations 65* under the *Act of 1924* covered "Period of limitation upon collection of tax" and made reference to the four and five years "after the return was filed," for the beginning of "a proceeding in court for the collection" of the taxes imposed by the several Acts aforesaid, and dealt with the "Exceptions to the period of limitations" along the lines of the provisions appearing in section 277(a) of the Act and *Article 1271* of the Regulations above, other than there was no provision therein similar to *subdivision (6)* of *Article 1271*.

It should be noted that *subdivision (5)* of *Article 1272* contains a very specific and pointed reference to the fact that *where a false or fraudulent return with intent to evade tax* had been filed and *"such tax is assessed"*, then "a proceeding in court or distraint for the collection thereof may be begun within six years after the assessment was made." This is a clear admission by the Commissioner of Internal Revenue as far back as Regulations 65 under the Act of 1924 that he had *only six years after assessment* to begin proceedings for collection *even in cases of fraud.* (Court decisions have also so declared.)

From all of the above references to the *Act of 1924* and *Regulations 65* thereunder, it is clear that the statute and the Regulations provided for *an extension* of the statutory period where a notice of deficiency was mailed, and that where the taxpayer and the Commissioner *consented in writing* to the assessment of the tax *"after the time"* prescribed in section 277 therefor, they were dealing *only with rights* which *the taxpayer* would have *at the expiration* of the "period prescribed in section 277 or in this section [278]", and that there was *never any intention* to affect *the rights of the Commissioner* "within the period prescribed in section 277".

House of Representatives Report No. 179 (Add. C. A. 8c), clearly stated the purpose of subdivision 277 (b) as being to remove the necessity of the Treasury's assessing without opportunity for hearing "the amount of a deficiency *discovered just before the expiration* of the statutory *period* for assessment", and that *"By extending* the period in which an assessment may be made, as is here provided, the taxpayer may be given the opportunity of a hearing without jeopardizing the assessment and collection of the tax."

Said *Report No. 179* in treating of section 278(d) stated, *inter alia*, that the purpose of "*a limitation*" upon assessment is to assure the taxpayer that "after the *period has run, no assessment shall be made* and *no taxes may be collected* from him." How can it reasonably be said that if this statement had been "after the limitation has expired" Congress would have said anything differently from that which it did say in using the words "after the period has run", and particularly when this Court has so plainly said in *Updike, Infra*, in passing upon the meaning of the words of section 278(d) of the Act of 1926, "within the statutory period of limitation properly applicable thereto", which took the place of the words of section 278(d) of the Act of 1924, "within the period prescribed in section 277 or in this section", that "The clear intent of section 278, * * * was to designate *the extent of time* for the enforcement of the tax liability"? Any other reasoning is absurd.

House of Representatives Report No. 844 on the *Revenue Bill of 1924* (Add. C. A. 10c) in making reference to Amendments Nos. 112, 155 and 231, stated that the House Bill authorized the "collection *at any time*" by distraint or by proceeding in court "of a tax *assessed within the prescribed period*", and that the "Senate Amendments placed *a limitation of six years after* the *assessment* of the tax" upon proceedings in court and distraint for its collection: and that the "House recedes on Amendments Nos. 112 and 231, and recedes on Amendment No. 155 with an Amendment making a clerical change." As to Amendments Nos. 113 and 232 the House Report stated that the *Senate Amendments* reword the subdivisions in order to make it clear that the section does not extend to assessments, distraints or proceedings "*already barred*" by the existing law, or to assessments, distraints or proceedings already

made or begun under the existing law before the Amendment "by this Act," and the House recedes. The Senate Amendments were clearly "to protect the taxpayer", as shown hereinafter on Section 278(d).

Committee of Finance of the Senate Report No. 398 (Add. C. A. 10c) made substantially the same comment respecting Section 277(b) of the Bill as did the House Report, that is, "*By extending* the *period* within which an assessment may be made" of "a deficiency *discovered* just before *the expiration* of the *statutory period for assessment*," the taxpayer may be given the opportunity of a hearing without jeopardizing the assessment and collection of the tax. In dealing with Section 278(d) of the Bill, the Senate Report made reference to the fact that, "This subdivision *in the House Bill* authorized the collection *at any time thereafter*, by distraint or by proceeding in Court, of a tax assessed within the period prescribed in Section 277", and that "*In order to protect the taxpayer further* a *limitation* of six years after the assessment of the tax" has been placed upon proceedings in Court and distraint for its collection, and that "At *the end of such period* the taxpayer *is assured* that his tax liability *is finally determined*" (Italics supplied).

Thus, it can plainly be seen from the comments contained in the several Congressional Reports on the *Revenue Bill of 1924* above referred to that *the intent of Congress* was to spell out in very definite language *the rights of the Commissioner* of Internal Revenue in *the assessment and collection of deficiencies* in income taxes within definite stated times or "statutory periods of limitations", and *to preserve and protect by equally clear language the rights of taxpayers upon the expiration* of such times or "statutory periods of limitations", either as therein provided or

as otherwise agreed upon by the Commissioner and the taxpayer. It should be carefully noted that the "intent" of Congress was plainly to "protect" the taxpayer at all times against "unlimited" rights of collection where the taxpayer had met the requirements of the Act as to returns, *and even in those cases where he had not done so,* as in the case of *a false or fraudulent return with intent to evade tax* or no return at all, *the limitation* for beginning suit *after assessment* was fixed *at six years.*

Turning now to the *Revenue Act of 1926, Section 274 (a)* thereof, give the taxpayer 60 days after a notice of deficiency within which to file a petition with the Board of Tax Appeals, and provided, further, except as otherwise provided in subdivision (d) covering waivers of the restrictions provided in subdivision (a) or subdivision (f) of Section 274, or in Sections 279, 282, or 1001, that *no assessment of a deficiency in tax* and *no distraint or proceeding in Court for its collection* shall be made, begun, or prosecuted until such notice had been mailed to the taxpayer, "nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final." Section 277 covered the "Period of Limitation Upon Assessment and Collection of Tax", with subdivision (a) thereof providing "Except as provided in section 278", that the amount of income taxes imposed by "this Act" *shall be assessed "within three years"* after the return was filed; that the amount of income, excess-profits, and war-profits taxes imposed by the *Revenue Act of 1921,* and by such Act as Amended, for the year 1921 and succeeding years, and the amount of income taxes imposed by the *Act of 1924* shall be assessed *"within four years"* after the return was filed; and the amount of income, excess-profits, and war-

profits taxes imposed by the various Revenue Acts from 1909 through the Revenue Act of 1918, and by any such Act as amended, shall be assessed "*within five years*" after the return was filed: and that in all such cases no proceeding in Court *without assessment* for the collection of such taxes "shall be begun after the expiration of such period."

Section 277(b) of the *Act of 1926* contained for the first time the expresson "The running of the statute of limitations * * * shall * * * be suspended * * * ", etc. Specifically, and completely, this subdivision provided:

> "(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter."

By a comparison of this subdivision with *subdivision 277 (b)* of the *Act of 1924* it will be noted that while under this latter subdivision of the *Act of 1924* the "period" within which an assessment *was required* to be made by subdivision (a) of section 277 in respect of any deficiency "shall be extended" by 60 days if a notice of deficiency had been mailed to the taxpayer under subdivision (a) of section 274 *and no appeal* had been *filed* with the Board, or *if an appeal* had been *filed*, then the "period" within which an assessment *was required* to be made *shall be extended by the number of days* between the *date* of the *mailing* of *such notice and* the *date* of the *final decision by the Board*, under *Section 277(b)* of the *Act of 1926* the provision was that, "*The running of the statute of limitations* provided in sec-

tion 277 or in section 278" *on* the *making of assessments* and the *beginning of distraint* or *a proceeding in Court for collection,* in respect of any deficiency, "*shall* (after the mailing of a notice under subdivision (a) of Section 274) *be suspended* for the period during which the Commissioner *is prohibited* from *making the assessment* or *beginning distraint or a proceeding in Court,* and for 60 days thereafter."

Certainly Congress *must have intended through the complete rewriting* of *Section 277(b)* of the *Act of 1924* as was done in *Section 277(b)* of the *Act of 1926,* to make some changes in the 1924 Act in "The period within which an assessment is required to be made", when it clearly provided in the 1926 Act *not* that such "*period*" *shall be* "*extended*" as in the Act of 1924, but that "*The running* of the *statute of limitations* * * * *shall* * * * *be suspended*" *for the period* during which the Commissioner "is prohibited from making the assessment or beginning distraint or a proceeding in Court, and for 60 days thereafter." Certainly "*extended*", which clearly means, prolonged, increased, lengthened, enlarged, cannot possibly be considered as synonymous with "*suspended*", which equally clearly means, held in abeyance, temporarily inoperative, arrested, interrupted, stopped for a time, all of which are *the direct opposite* to prolonged, increased, lengthened, enlarged, extended. When *Section 277 (b)* of the *Act of 1924* and *Section 277(b)* of the *Act of 1926* are compared and analyzed there can be no doubt of the fact that in the former Congress was providing for an "*extension*" of the statute in the manner and for the times set forth therein, while in *Section 277(b)* of the *Act of 1926* it was clearly providing for the "suspension" of *the expiration date* of the "statute of limitations" in the manner and for the time therein stated. *That the*

latter is true may be seen from statements in the Congressional Committee Reports.

In the *Committee on Finance Report* to accompany the *Revenue Bill of 1926* (Add. C. A. 14c) in dealing with Section 277(b) of the Bill, the Report stated:

> "The House Bill in section 277(b) provided that the *running* of the *statute of limitations* upon the making of assessments or collection *shall be suspended* for the period during which the Commissioner is prohibited from making the assessment or collection. *The Committee recommends* that a *provision be added* that *in no event shall the Commissioner have less than 60 days after the decision of the Board has become final in which to make the assessment, and also* that in case *where no petition is filed* with the Board, he shall have *at least 90 days after the mailing of the notice in which to make the assessment*" (Italics supplied).

In dealing with the *House of Representatives Report No. 356*, being the *Conference Report* of the *Committee of Conference* of the *Revenue Bill of 1926* (Add. C. A. 17c) in the "Report and Statement of the Managers on the part of the House" on such Bill, it was stated:

> "*Amendment No. 83:* The *House Bill* provided that the *running of the statute of limitations* on the *assessment and collection of a deficiency should be suspended for the period during which*, under the provisions of the income tax title, the *Commissioner* is *prohibited from making* the *assessment or collection.* The *Senate Amendment suspends* the *running of the statute* for the period during which, *for any reason*, the *Commissioner's hands are tied and in addition assures him* a period of *at least sixty days after he is free* in which *to make the assessment or bring proceedings for collection.* The *House recedes.*"

> "*Amendment No. 85:* This Amendment rewrites in more definite language, and correcting clerical mistakes, subdivisions (d) and (e) of section 278 of the

House Bill, *dealing with the time* within which *distraint* or *proceeding in court may be begun* after the *assessment has been made*. The House recedes" (Italics supplied).

Page 49 of said Conference Report in dealing with Amendment No. 96 on the Bill stated:

> "*Amendment No. 96:* The *Senate Bill* provides that if a taxpayer has *on or before June 15, 1926, filed a waiver* giving the Commissioner *additional time* in which to assess taxes due *for* the calendar year *1920 or 1921*, then a *credit or refund* relating to the *taxes of such years* shall be allowed or made *if claim therefor* is filed *either on or before April 1, 1927*, or *within four years* from the time the tax was paid. *This Amendment is in accordance with the similar action taken by Congress at various times with respect to the giving of waivers for the assessment of taxes for* 1917, 1918 and 1919. It seems *only reasonable* if a taxpayer *waives* the *statute of limitations* and *permits the Commissioner to make an assessment after the expiration of the statute, that a similar right for filing a claim for refund should be granted to the* taxpayer; and the *House recedes*" (Italics supplied).

It is clear that in the use of the term "The running of the statute of limitations" in Section 277(b) of the Bill, the *House* and the *Senate* in all of their Reports had reference *entirely and only* to *the expiration of the statute of limitations*, and that it was *this date* and not some *period of time* which Congress provided "shall * * * be suspended".

If any doubt be held as to what Congress meant by the use of the words last above quoted, such doubt should be resolved by a consideration of *Section 1130* of the *Revenue Act of 1926* dealing with the "Date on which distraint is begun", and the other factors hereinafter pointed out. Such Section provided:

> "*In determining the running of any period of limitation* in respect *of distraint, the distraint shall be held*

to have been begun (a) in the case of *personal property, on the date* on which the levy upon such property is made, or (b) in the case of *real property, on the date* on which notice of the time and place of sale is given to the person whose estate it is proposed to sell" (Italics supplied).

In dealing with this Section of the *Revenue Bill of 1926* the *Committee of Finance Report*, being *Senate Report No. 52*, on such Bill (Add. C. A. 15c) stated:

> "*Under existing law* considerable difficulty is encountered by reason of the fact that *no time* is specified *as the date* on which distraint proceedings are begun. The Amendment fixes *a definite and readily ascertainable date*, in the case of both personalty and real property" (Italics supplied).

The "considerable difficulty" referred to above could only have had reference to questions arising as to whether distraint proceedings had been begun *on a date* before or after *the expiration* of the statute of limitations therefor.

When the Commissioner of Internal Revenue came to writing his Regulations pertaining to the "Period of limitation upon collection of tax", he included in *Article 1272* of *Regulations 69* Section 1130 in practically the very same words of the statute as follows:

> "* * *. *In determining the running of the statute of limitations* in respect *of distraint, the distraint shall be held to have been begun*, in the case of *personal property, on the date* on which the levy upon such property is made, or, in the case of *real property, on the date* on which notice of the time and place of sale is given to the person whose estate it is proposed to sell. (See section 1130)." (Italics supplied).

While *Section 1130 above* dealt only with *"determining the running of any period of limitation* in respect *of distraint"*, the Commissioner of Internal Revenue *in the very*

same Article of his Regulations in which, as above stated, he incorporated practically word for word the provisions of the statute, he also stated:

> "If *a notice of a deficiency has been mailed to* the taxpayer under the provisions of section 274 (a) (see article 1232), then *the running of the statute of limitations on the beginning of distraint* after assessment, or *on the beginning of a proceeding in court* after assessment or without assessment, *shall be suspended* for the period during which the Commissioner is *prohibited from beginning such distraint* or *proceeding in court* and for 60 days thereafter" (Italics supplied).

Clearly, *In Section 1130* Congress was dealing with the *expiration date* "of any period of limitation" in respect of distraint and so was the Commissioner *in his Article 1272 in dealing with distraint.* How, then, when in that same Article the Commissioner is dealing with "the running of the statute of limitations on the beginning of distraint after assessment, or on the beginning of a proceeding in court after assessment or without assessment" where a notice of deficiency had been mailed to the taxpayer under Section 274(a) of the Act, can it be said that he was dealing with something other than the *expiration date* of the statute of limitations which "shall be suspended" for the period during which the Commissioner is prohibited "from beginning" *such distraint* or *proceeding in court,* and for 60 days thereafter? (Note that while Section 1130 uses the expression "In determining the running of *any period of limitation*", *the Commissioner in his Article 1272* of *Regulations 69* uses the expression "In determining the running of *the statute of limitations*" and makes reference to Section 1130, showing very definitely that he does not differentiate between the words "*any period of limitation*" and "*the statute of limitations.*)"

Since both Section 1130 and the Commissioner's Regulations thereon are definitely dealing with *a date "In determining* the *running of the period of limitation"* or *"the statute of limitations"* and not a *"period"* of time, (which "period" the Government has argued in various cases, connotes "a stated *interval of time* commonly thought of in terms of years, months and days", [and which argument this Court unqualifiedly *rejected*] *Updike, infra*), how can it then logically be said that in the *very next paragraph of the same Article* of the Regulations, in dealing with the situation where a notice of deficiency has been mailed under the provisions of Section 274(a) and stating that "the *running* of the statute of limitations" *on the beginning* of distraint after assessment; or *on the beginning* of a proceeding in court after assessment or without assessment, he was dealing with a "period" of time which "shall be suspended", rather than the *date of the expiration* of the statute of limitations? That *Section 1130* and *Article 1272* of *Regulation 69* in using the words "the running" of *any period of limitation* or *the statute of limitations* meant the *"expiration"* thereof "shall be suspended" and not that a *"period"* of time in "any *period of limitation*" or in "the *statute of limitations*" "shall be suspended", is clearly shown when the words "the running" are taken out of the words of *Section 1130* and *Article 1272* of the Regulations and the words "the expiration" are inserted therein. The statute would then read:

> *"In determining the expiration* of any period of limitation in respect of distraint, the distraint shall be held to have been begun (a) in the case of personal property, *on the date* * * * or (b) in the case of real property, *on the date* * * *." (Italics supplied).

And the Regulations would then read:

> "* * *. *In determining the expiration* of the statute of limitations in respect of distraint, the distraint shall

be held to have been begun, in the case of personal property, *on the date* * * * or, in the case of real property, *on the date* * * *." (Italics supplied).

And the next paragraph of the Regulations would then read:

> "If a notice of deficiency has been mailed to the taxpayer under the provisions of section 274(a) * * * then *the expiration* of the statute of limitations on the beginning of distraint after assessment, or on the beginning of a proceeding in court after assessment or without assessment, *shall be suspended* * * *." (Italics supplied).

Thus, it can readily be seen that the changing of the words "*the running*" to "*the expiration*" makes sense and does not distort the meaning of *either* the Act *or* the Regulations. It will be seen, however, that when the same test is applied to *both* the Act and the Regulations by changing the words "*the running*" to "*period of time*" that *neither* the *Act nor* the *Regulations* makes sense and *both* are *plainly distorted*, as is clearly seen from the following:

If that which "shall be suspended" is a "*period of time*" in "any period of limitation" or "in the statute of limitations", *as the Government has in a number of cases contended and which contention the courts in a number of such cases have approved* and determined (which contentions and all of which decisions are plainly contrary to the intent of Congress and the law), then Section 1130 of the statute would read:

> "Section 1130. *In determining* the *period of time* of any period of limitation in respect of distraint, the distraint shall be held to have been begun (a) in the case of personal property, *on the date* * * * or, (b) in the case of real property, *on the date* * * *."

Plainly, *any such change would not make sense*, because "the *period of time* of any period of limitation in respect of

distraint" would not have *to be determined, as it is already fixed by Section 278(d) of the statute.* When Section 1130 was written into the law its purpose, *according to the statements appearing in the Committee of Finance Report, Senate Report No. 52, to accompany the Revenue Bill of 1926,* was to eliminate the "considerable difficulty" which had been encountered "Under existing law" because "no time" was therein specified as "*the date* on which distraint proceedings are begun", and that the "Amendment" by Section 1130 "fixes a definite and readily ascertainable *date*" of such beginning. The "considerable difficulty" could only have to do with claims by taxpayers that distraints *were begun beyond the expiration of the statutory "period" of limitation* therefor, otherwise there would not have been any need for any provision as in Section 1130 that "In determining *the running* of any period of limitations * * *."

If that which "shall be suspended" is a "*period of time*" in "any period of limitation" or "in the statute of limitations," *as the Government has in a number of cases contended and which the courts in a number of such cases have been talked into believing and so determining,* then *Article 1272* of the Regulations *would* have provided:

> "In any case in which the tax has been assessed within the statutory period of limitation properly applicable thereto, a proceeding in court or distraint for the collection of such tax may be begun within six years after the assessment thereof, or prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer. In determining the *period of time* of the statute of limitations in respect of distraint, the distraint shall be held to have been begun, in the case of personal property, *on the date* on which the levy upon such property is made, or, in the case of real property, *on the date* on which notice of the time and place of sale is given to the person

whose estate it is proposed to sell. (See section 1130.)" (Italics supplied).

But here, again, *the elimination* of the words *"the running"* from the Regulations and *the insertion* in place thereof of the words *"the period of time"* would *make no sense whatever,* because there is no need for "determining" the *period of time* of the statute of limitations in respect to distraint, *because that is definitely fixed by Section 278(d)* of the statute.

When we proceed into the very next paragraph of Article 1272 *and eliminate* the words "the running" from the first sentence thereof *and insert* in place thereof *"the period of time"* the sentence would then read:

> "If a notice of a deficiency has been mailed to the taxpayer under the provisions of section 274(a) (see article 1232), then *the period of time* of the statute of limitations *on the beginning* of distraint after assessment, or *on the beginning* of a proceeding in court after assessment or without assessment, shall be suspended * * *." (Italics supplied).

Here again *the elimination* of the words *"the running"* and *the insertion* of the words *"the period of time"* would *make no sense whatever* and would be superfluous, because the insertion of the latter words would be no different than if such clause of the sentence merely read "* * * then the statute of limitations on the beginning of distraint * * *", etc., and would thus *completely eliminate* the words "the running" and give *no effect or meaning whatsoever to such words,* which clearly would be *directly contrary* to *the intent of Congress when it wrote Section 1130 into the statute.*

Certainly in determining what Congress meant by the use of the words *"the running* of the statute of limitations * * * shall * * * be suspended", as provided, for the first

time, in Section 277(b) of the *Revenue Act of 1926* and *continuously repeated* in the enactments of Section 277 of the Revenue *Acts of 1928, 1932, 1934 and 1936*, and the *Internal Revenue Code of 1939*, the *plain intent* of Congress in writing into the *Act of 1926* the provisions of Section 1130, wherein it specifically provided, "*In determining the running of any period of limitation* in respect of distraint", the distraint "*shall be held*" *to have been begun* "*on the date*", cannot be disregarded, because it there very definitely said that what it meant by the use of the words "*In determining the running*" was that, "In determining *the expiration* of any period of limitation in respect of distraint", etc. Any other reasoning or construction plainly *distorts the statute* and *the clear intent of Congress. And the Commissioner of Internal Revenue in all of his Regulations recognized that was what Congress meant!*

The provisions of *Section 1130* were continued in full force and effect through the Revenue *Acts of 1928 and 1932*. The provisions of *Article 1272* of *Regulations 69* under the *Act of 1926*, as quoted above, dealing with "*the running*" of the statute of limitations with respect to the beginning of distraint after assessment and on the beginning of a proceeding in court after assessment or without assessment "*shall be suspended*" were *continued right on through in exactly the same words* in the Commissioner's *Regulations 74* under the *Act of 1928*, in *Regulations 77* under the *Act of 1932*, in *Regulations 86* under the *Act of 1934*, in *Regulations 94* under the *Act of 1936*, in *Regulations 101* under the *Act of 1938*, in *Regulations 103* under the *Internal Revenue Code of 1939* which Regulations terminated December 31, 1941, in *Regulations 111* under that Code, which were effective as to all taxable years beginning on or after January 1, 1942, and *in all of the Commissioner's Regula-*

tions thereafter right on up to his Regulations under the 1954 Code!

Plainly, *Section 1130* of the Revenue *Act of 1926* and the *Commissioner's Regulations thereunder* in *Article 1272* of *Regulations 69*, and *the continuance of Section 1130* in effect, at least in the *Revenue Acts of 1928 and 1932, coupled with the continuance by the Commissioner of Internal Revenue in his Regulations right on up through all of the years 1936 through 1941 of the exact provisions of original Article 1272 of* the Regulations (so far as Section 1130 is concerned) represent *positive declarations by Congress, reiterated on* at least *two occasions,* in the passage of the Revenue *Acts of 1928 and 1932* and by the Commissioner of Internal Revenue *reiterated on* at least *seven occasions,* that what was meant by *both Congress and the Commissioner* in the use of the words *"the running* of any period of limitation" and *"the running* of the statute of limitations" was *"the expiration* of the statute of limitations". And, further, *it should be remembered,* these declarations *by the Commissioner of the intent of Congress* were *tied right into* and *became part of his Regulations* under *Sections 277 and 278 of the Revenue Act of 1926,* covering the "Period of Limitation Upon Assessment and Collection of Tax", *and part of the limitation provisions of all of the later Revenue Acts and the Internal Revenue Code of 1939 and right on up to the Internal Revenue Code of 1954,* as well as *part of the Commissioner's Regulations under all of said Acts and the prior Code!*

Based upon what has been stated above, the resolution of the question of what was meant by the use of the words in each of the *Offers in Compromise* that the taxpayer agrees *"to the suspension of the running of the statutory period of limitations on * * * collection", is plainly found*

in Section 1130 of the *Revenue Act of 1926* and *the Commissioner's Regulations thereunder, as well as the later Acts and Regulations*, all as above set forth.

Despite the clear mandate of Congress, in *Section 1130* and *the recognition thereof by the Commissioner* of Internal Revenue *in his first Regulations thereunder*, and *despite the continuance* of *Section 1130* in full force and effect *by Congress after the passage* of the *Revenue Acts of 1928 and 1932* and *the continued reiteration by the Commissioner* of his original Regulations in his subsequent Regulations, *of substantially the exact words* of *Section 1130, nowhere* in *any of the cases* (and there are dozens of them which Counsel for Petitioner have read and analyzed) is there *the slightest intimation* that there *ever was such a provision as Section 1130* in the law *or any provision in the Regulations dealing therewith as set forth above.* What could be the reason for this? Does it not seem strange, with all of the litigation which has gone through the Board of Tax Appeals, the Tax Court, the various District Courts and the Courts of Appeals, that somewhere along the line some representative of the taxpayer would advance the positions taken above? It does seem strange, and, yet, *it is the fact* that in all the cases which Counsel for Petitioner have read and analyzed there is not *one word dealing with Section 1130 and/or the Commissioner's Regulations thereunder!* Possibly the reasons why representatives of the taxpayers involved in the various cases did not try to use that Section and the Commissioner's Regulations thereunder to their advantage are because of the fact that Section 1130 in the original Act is far removed from Sections 277 and 278, dealing with the "Period of Limitation Upon Assessment and Collection of Taxes" and far removed from the various other Sections of that Act dealing with Periods of Limitations Upon Assessment and Collection

of Other Taxes under that Act, as well as under later Acts; because Section 1130 was *not* rewritten *into the later Revenue Acts as a section thereof* but was simply allowed to stand in full force and effect thereby; and because of the still further fact that the Commissioner of Internal Revenue in his very first Regulations under this Section of the Act *did not set up Regulations specifically under Section 1130,* as he ordinarily does under almost every section of a revenue act, but simply incorporated *as part* of *Article 1272* of his *Regulations 69* the statutory provisions of Section 1130 practically word for word (his only change being that where Section 1130 used the words "the running of *any period of limitation*", he used the words "the running of *the statute of limitations*"), and then at the end of his practical quotation from the law, he made only this slight reference thereto "(See Section 1130)", and then in *all of his Regulations* thereafter, *despite the fact that he used the same wording as in Regulations 69* under the 1926 Act, *he even eliminated* his reference *to Section 1130! But he did continue* to place *substantially the words* of *Section 1130* in the Articles of his Regulations *under the* "Period of Limitation Upon Assessment and Collection of Tax" *provisions of the later Revenue Acts similar to Sections 277 and 278 of the Act of 1926!* Counsel for Petitioner can understand how various counsel for taxpayers could have failed to see these provisions of the *Revenue Acts* and *Regulations.* It was almost like finding a needle in a haystack to see them, and unless *a tax practitioner had the original Regulations* (with the Commissioner's having eliminated, beginning with his second one, namely, Regulations 74, *all* reference to Section 1130) *or made a most extensive and intensive study of the entire history and development of the assessment and collection provisions,* it would have been next to impossible for him *to have seen the picture painted for him* by *the Revenue Acts and the Regulations!*

Why was it, one asks, that *Government Counsel* in some of the assessment, collection or offer in compromise cases, involving the meaning of the words "the running of the statute of limitations * * * shall * * * be suspended" did not bring up and make reference to Section 1130 and the Commissioner's Regulations thereunder *in support* of *their oft-taken position* that "the running of the statute of limitations * * * shall * * * be suspended" had reference to the "suspension" of a "*period of time*" within the statute? *The reason is clear.* The *plain provisions* of *the Revenue Acts* and *the Commissioner's Regulations* thereunder were *directly opposed to such contention!* Where the Commissioner has taken a position in his Regulations and has reiterated that position in later Regulations and Congress has neither made unfavorable comments on it nor said the Regulations were not a proper construction of the Act, or changed the provisions of the Act, none of which was done here, *the Commissioner always takes the position* that his Regulations thereby have *the full force and effect of law,* and *the courts* in a great majority of the cases *go along with that reasoning.* Can it be thought for one minute that *none* of the *Government's Counsel in all of the cases litigating the question ever heard* of *Section 1130 and the Commissioner's Regulations thereunder, reiterated on more than half a dozen occasions in over 25 years?* To so think is absurd. The answer is, any reference thereto *in support of the Government's position* directly *contrary* thereto would have *kicked it right out of court!*

Then the question arises, if Section 1130 and the Commisioner's Regulations thereunder and thereafter as above set forth are the answer to the question of what Congress intended by the use of the words "the running of the statute of limitations * * * shall * * * be suspended" in the Sec-

tions of the Acts dealing with the Period of Limitation Upon Assessment and Collection, *why did not the various courts which heard and decided* some of *the cases involving the question* make reference thereto? The reason is plain. Since in *none* of the cases read and analyzed did *counsel for taxpayers* advance *any* position *respecting Section 1130 and the Regulations thereunder*, and since it would *not have been profitable* for *Government Counsel to have done so, the courts* had *no opportunity* for considering, or ground upon which to determine, *the effect of Section 1130 and the Commissioner's Regulations thereunder on the question involved.* And here the the District Court while given that opportunity *ignored it completely*, preferring to base its ultimate conclusion on a case not even cited by Government Counsel, and the Court of Appeals affirmed!

The *Revenue Act of 1928*, Section 275 thereof, dealing with the "Period of Limitation Upon Assessment and Collection", and "Except as provided in Section 276", set up the "General rule" in subdivision (a) thereof that the amount of taxes imposed by the *income tax title of the Act* should be assessed *within two years* after the return was filed and that no proceeding in court *without assessment* for the collection of such taxes should be begun after the expiration of such period. Here, again, Congress continued to show *its intent to decrease the periods of time* given to the Commissioner of Internal Revenue *to assess and collect taxes*, which intent started with the Revenue *Act of 1921* in cutting the *five-year* limitation to *four years*, which was contained in the *Act of 1924*, and with the Revenue *Act of 1926* cutting the limitation to *three years.* The *exceptions* of Section 276 were substantially the same as those set out in the prior Acts. Section 277, headed "Suspension of Running of Statute", was the same as *Section 277(b)* of the *Act of 1926* as it was amended by

Section 504(a) of the *Act of 1928*, the Amendment being the addition of "(and in no event, if a proceeding in respect of such deficiency is placed on the docket of the Board, until the decision of the Board becomes final)". *Articles 1201* and *1202* of the Commissioner's *Regulations 74* represented his construction of Sections 275, 276 and 277 of the Act, and with Article 1202 respecting *"the running"*, etc., being the same as in *Article 1272* of *Regulations 69*, other than to reflect the above quoted Amendment by *Section 504(a)* of the *1928* Act (Add. C. A. 21c).

In the *Report of the Committee on Ways and Means* of the *House*, being *Report No. 2*, dated December 7, 1927, on the *Revenue Bill of 1928* (Add. 23c), there appeared statements respecting Section 277 of the Bill. After dealing with certain situations in cases before the Board of Tax Appeals, to cover which "it is specifically provided in Section 277 that the *limitation period* shall be suspended", the Report states:

> "* * *. Accordingly, in all the foregoing cases, the *limitation on assessment* is definitely suspended by Section 277 until the decision of the Board has become final and for sixty days thereafter.
>
> * * *
>
> "It was suggested to the Committee that language be inserted to show that *the running of the statute should be suspended* not only while the Commissioner is under *the prohibitions* of section 272(a) *but also when he is restrained by order of court* from making assessment or collection. The Committee feels that the language of the present statute *is perfectly definite* on this point *and no clarification is necessary.* The *statement of the conference in connection* with *Amendment No. 83* to the Revenue Act of 1926 *was specific on the point and clearly indicated that the intention* was *to suspend the running of the statute for the period during which, for any reason at all*, the Commissioner's hands were tied" (Italics supplied).

The provisions of the Revenue *Act of 1932* dealing with the *Period of Limitation Upon Assessment and Collection* as contained in *Sections 275, 276 and 277* are substantially as in the *Act of 1928*, and *Articles 1201 and 1202* of *Regulations 77* under the *Act of 1932* are substantially the same as in *Regulations 74* under the *Act of 1928*. There is nothing in the Congressional Reports which adds anything to what has been stated above under prior Acts (See Add. C. A. 26c).

The same thing is true with respect to *Sections 275, 276 and 277* of the *Act of 1934* and *Regulations 86* thereunder (See Add. C. A. 28c). *Report No. 704* of the *Committee on Ways and Means of the House*, dated February 12, 1934, which was to accompany the *Revenue Bill of 1934*, after stating that the Report was "the result of careful and mature consideration", contained this statement:

> "Your Committee has carefully considered the Sub-Committee's recommendations, the suggestions of the Secretary of the Treasury, and the testimony of the witnesses appearing at the public hearings. The Bill now reported has been prepared on the merits of each question after giving due consideration to the facts, recommendations and suggestions by the Committee."

While the Report contained *no comments* on *Section 277* of the Bill providing for the *suspension of the running of the statute of limitations*, it did contain a statement on page 34 thereof showing clearly that *once again* when Congress used the term *"the running of the statute"* as being *"suspended"*, it plainly had reference *to the suspension of the expiration date* of the statute and *not* to *the suspension of a period of time within the statute*. In dealing with Section 274 of the Bill, covering "Bankruptcy and Receiverships", the Report stated:

"Section 274. Bankruptcy and Receiverships: The present law provides for *immediate* assessment *in* cases of *bankruptcy* or *receivership regardless of* the *restrictions* imposed by section 272 (a). The result of bankruptcy or receivership is, therefore, to take the case from the jurisdiction of the United States Board of Tax Appeals in case of deficiency. There is *no specific provision*, however, *requiring* the *trustee in bankruptcy or* the *receiver to give notice* to the Commissioner *of his appointment*. As a result, *the statute of limitations frequently runs against the government* through inability of the government to ascertain the status of the taxpayer. *To correct this situation* a change has been made in this section requiring the trustee in bankruptcy or the receiver to notify the Commissioner of the adjudication or the appointment of a receiver, and the *running of the statute is suspended for a period of 30 days after the date of the receipt of the notice by the Commissioner*" (Italics supplied).

How can "runs against" here mean anything other than "expires against"? We submit it cannot.

Section 275(a) of the *Act of 1934* provided that the amount of income taxes imposed "by this title" shall be assessed *within three years* after the return was made, and no proceeding in court *without assessment* for the collection of such taxes *"shall be begun" after the expiration* of such period. This changed the *two-year* limitation of the *Acts of 1932 and 1928* and put the limitation back to where it was under the *Act of 1926*. The above *Ways and Means Committee Report* upon commenting upon this change stated:

"Section 275. Period for Assessment and Collection: The present law limits the time for assessments to two years from the date the return is filed. Experience has shown that this period is too short in a substantial number of large cases, resulting oftentimes in hastily prepared determinations with the re-

sult that additional burdens are thrown upon taxpayers in getting *ill-advised assessments removed.* In other cases, revenue is lost by reason of the fact that sufficient time is not allowed for disclosure of all the facts. Subsection (a), therefore, increases the period of *two years* to *three years.*" (Italics supplied).

Said House Ways and Means Committee Report No. 704 further stated on page 38:

> "Section 505. Bankruptcy and Receiverships: This section amends section 274 (a) of the Revenue Act of 1932 and the Revenue Act of 1928 and section 282 (a) of the Revenue Act of 1926 relating to the procedures to be followed in bankruptcy and receivership cases, so that *the running of the statute of limitations against the government on the making of assessments* will be *suspended* for the period *(not to exceed two years)* from the date of the adjudication in bankruptcy or the appointment of a receiver to a date thirty days after the date upon which notice is received by the Commissioner from the trustee or receiver of the adjudication in bankruptcy or the appointment of the receiver. *This Amendment* will bring the *1926, 1928* and *1932 Revenue Acts* in accord with the provisions in the present Bill relating to the same subject, *and will protect the rights* of the government. Under existing law, unless the Commissioner *discovers* that a taxpayer has been *adjudicated bankrupt* or that *a receiver has been appointed* for the taxpayer, *he is unable to protect the rights of the government in assessing income taxes.* This is due to the fact that *in case of bankruptcy or receivership the running of the statute of limitations on assessments* is *not suspended, as in the ordinary case,* by the Commissioner's sending of the 60-Day Letter, since the usual restrictions upon assessments are automatically suspended. In many such cases the Commissioner will have no way of knowing that such restrictions have been suspended, unless the law provides, as this section does, that the Commissioner is to be notified of the adjudication in bankruptcy or the appointment of the receiver" (Italics supplied).

While pages 43 and 44 of the Report to accompany H. R. 7835, submitted by the *Committee on Finance of the Senate*, being *Report No. 558*, Calendar No. 591, dated March 28, 1934 (73rd Congress, Second Session), on the *Revenue Bill of 1934* deal with Section 275 of the Bill, covering Period for Assessment and Collection and increase the prior two-year period to three years and in decedents' estates the period from one year to 18 months, there is nothing in this Report with respect to *Section 277* dealing with the *suspension of the running of the statute*. This Senate Committee Report deals with Section 505, covering Bankruptcy and Receiverships, very much along the lines of the House Report above and finally states: "* * * your Committee makes no change in this section of the House Bill."

Report No. 1385 of the *House of Representatives Committee of Conference Report* to accompany H. R. 7835, dated April 30, 1934 (73rd Congress, First Session) does not contain anything respecting *Section 277* of the proposed Bill dealing with the *suspension of the running of the statute*.

Section 277 of the *Act of 1934* dealing with "*Suspension of Running of Statute*" was the same as in the 1932 and 1928 Acts and the 1926 Act, as amended. *Regulations 86* promulgated by the Commissioner of Internal Revenue under the *Revenue Act of 1934* dealing with the several sections of such Act as above noted, were substantially the same as in prior *Regulations 77*, dealing with the same provisions of the *1932 Act*.

The *Revenue Act of 1936*, in Section 272, dealing with Procedure in General on deficiencies in Section 273, Jeopardy Assessments; in Section 274, Bankruptcy and Receiverships; in Section 275, Period of Limitation upon Assessment and Collection; in Section 276, Exceptions to

Section 275; and Section 277, *Suspension of Running of Statute*, contains the same provisions as in the *Revenue Act of 1934*, and the Commissioner's *Regulations 94* under the *Revenue Act of 1936*, in dealing with the above provisions of the Act, contain the same provisions as in *Regulations 86* under the *Revenue Act of 1934*.

House of Representatives Committee on Ways and Means Report No. 2475, dated April 21, 1936 (74th Congress, Second Session) to accompany H. R. 12395, the *Revenue Bill of 1936*, as well as *Report No. 2156*, Calendar No. 2265, dated June 1, 1936, of the *Committee on Finance of the Senate* to accompany said Bill, and also *House of Representatives Report No. 3068*, dated June 19, 1936, on said Bill, do not contain anything dealing with *Section 277* covering *suspension of the running of the statute of limitations*.

The *Revenue Act of 1938* in Section 272, covering Procedure in General on deficiencies, Section 274 on Bankruptcy and Receiverships, Section 275 on Period of Limitations upon Assessment and Collection, Section 276 on Exceptions to Section 275 and Section 277 on *Suspension of Running of Statute* and the Commissioner's *Regulations 101* dealing with such Sections of the Act contain substantially the same provisions in all respects as in the like-numbered Sections of the *Revenue Act of 1936* and the Commissioner's *Regulations 94* thereunder.

The last *complete* tax law enacted *before 1939* was the *Revenue Act of 1938*, the income tax provisions of which were applicable for taxable years *beginning after December 31, 1937*. The *1938 Act* was re-enacted as a part of the *Internal Revenue Code* on February 10, 1939.

The *Internal Revenue Code of 1939* provided in part:

"Sec. 5. *Continuance of Existing Law.*—Any provisions of law in force on the 2d day of January 1939 corresponding to a provision contained in the Internal Revenue Title shall remain in force until the corresponding provision under such Title takes effect."

Supplement L—Assessment and Collection of Deficiencies, of *Subchapter C—Supplemental Provisions*, of *Chapter 1—Income Tax*, of *Subtitle A—Taxes Subject to the Jurisdiction of the Board of Tax Appeals*, of the 1939 Code, pertains in part to the following subjects under the following numbered Sections:

Sec. 272. Procedure in general.

Sec. 275. Period of limitation upon assessment and collection.

Sec. 276. Same—Exceptions.

Sec. 277. Suspension of running of statute.

All of the above Sections are similar to the like-numbered Sections of the *Revenue Act of 1938*. *Regulations 103* under the *Internal Revenue Code of 1939* in dealing with the above Sections 272 and 275 through 277 of the Code were substantially the same as in *Regulations 101* dealing with the like-numbered Sections of the *Revenue Act of 1938*.

The *Revenue Act of 1939*, signed on June 29, 1939, was not a complete taxing act in itself but consisted of amendments of certain sections of the *Internal Revenue Code* and of the *1938 Act and prior laws*. None of its provisions made any changes in the above Sections 275 through 277 of the Internal Revenue Code.

Neither the *Revenue Act of 1940* nor the *Second Revenue Act of 1940* was a complete taxing statute in itself but consisted of amendments to the Code. Neither made any changes whatever in Sections 275 through 277 of the Code.

The *Revenue Act of 1941* was not a complete taxing statute in itself but consisted of amendments and additions to the Code. None of the provisions of Sections 275 through 277 of the Code were changed by this Act.

From all of the foregoing and particularly *Section 1130* of the Revenue *Act of 1926* (which was left undisturbed and in full force and effect upon the passage of the Revenue *Acts of 1928 and 1932*), together with certain of the Articles of the Regulations of the Commissioner of Internal Revenue under those Acts and the Revenue *Acts of 1934, 1936 and 1938* and the *Internal Revenue Code of 1939*, as set forth at length at pages 35c-41c of the Addendum to Appellant's Brief filed in the Court of Appeals, it can plainly be seen that when Congress placed in *Section 277(b)* of the Revenue *Act of 1926* for the first time the provision that "*The running of the statute of limitations* provided in this section and in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection in respect of any deficiency *shall* * * * *be suspended*", its *clear intent* in the use of the words "*The running of the statute of limitations* * * * *shall* * * * *be suspended*" was *to suspend* the *extent* of time for the enforcement of the tax liability, which *intent* was equally clearly shown in the Commissioner's *Regulations 69* under the Revenue *Act of 1926*, and *again and again reiterated* in his *Regulations 74* under the Revenue *Act of 1928*, in his *Regulations 77* under the Revenue *Act of 1932*, in his *Regulations 86* under the Revenue *Act of 1934*, in his *Regulations 94* under the Revenue *Act of 1936*, in his *Regulations 101* under the Revenue *Act of 1938*, in his *Regulations 103* under the *Internal Revenue Code of 1939*, in his *Regulations 111* under such Code, and in his *Regulations 118* thereunder; or, stated

in other words, that the words used clearly had reference *not* to the suspension of *a period of time* within the statute of limitations but rather to the suspension of *the expiration date* of the statute. The *exact* wording of *Section 1130* of the *1926 Act* was incorporated in the Commissioner's *Regulations 69* under that Act *and reiterated in all of his Income Tax Regulations* not only *until the passage* of the *Internal Revenue Code of 1939* and the *promulgation of the original Regulations thereunder* but *as well in his Regulations under the Amendments to that Code* and *right up to the time of the passage of the Internal Revenue Code of 1954. Section 277(b)* of the Revenue *Act of 1926*, which became *Section 277* of the Revenue *Act of 1928*, was thereafter continued as such in the Revenue *Acts of 1932, 1934, 1936 and 1938*, and then became *Section 277* of the *Internal Revenue Code of 1939*.

Subtitle F of the 1954 Code is designated "Procedure and Administration." Chapter 66 thereof deals with "Limitations", with Subchapter A thereof being headed "Limitations on Assessment and collection." Under Subchapter A are four Sections designated as follows:

Sec. 6501. Limitations on assessments and collection.

Sec. 6502. Collection after assessment.

Sec. 6503. Suspension of running of period of limitation.

Sec. 6504. Cross references.

See Appendix pp. 72-74 for Sections 6502 and 6503 and the Commissioner's Regulations thereunder.

That Congress in using the words "Period of Limitation upon Assessment and Collection of Tax" and "Suspension of Running of Period of Limitation" in 1966 was still dealing with *a date* in the "extent of time for the enforce-

ment of the tax liability" (Updike, *infra*) *rather than* a stated interval of time in terms of years, months and days, is clearly shown by some of its latest declarations, in connection with its enacting the so-called Federal Tax Lien Act of 1966 and amendments to Section 6503 of the Code, where in dealing with the *suspension* of *the running of the period of limitations* and problems of collection particularly in connection with taxpayers outside the United States, it stated (Add. 45e):

> "* * * The bill meets this problem by *not* suspending the *running of the period of limitations except when the taxpayer is continuously out of the country for 6 months or more. TO BE SURE that the Government has AN OPPORTUNITY TO COLLECT* the tax after his return, it is provided that in any event, the *PERIOD* is *NOT TO EXPIRE* (where the taxpayer has been out of the country for 6 months or more) *until 6 months after the taxpayer's return to the country*" (Italics and capitalization supplied).

Court Decisions

In *United States v. Updike*, 281 U. S. 489, 50 S. Ct. 367 (1930), in a suit by the Government against stockholders as transferees of a defunct corporation's assets to recover corporation taxes, in which the Government contended that the six-year limitation on court proceedings to collect such taxes applied only to proceedings to collect taxes as taxes and not to suits in equity to recover trust funds, the suit here being of the latter character, and that the suit was excluded from the limitation by virtue of Section 280 of the statute (Rev. Act of 1926), the Supreme Court held that the six-year limitation applied to the action. The Court further held that the *saving clause* "within the statutory period of limitations properly applicable thereto" in Section 278(d) was inserted *solely* for the protection

of the taxpayer to prevent collection of taxes even within six years after the assessment, where the assessment, when made, was barred by applicable statutory limitations. The Court further reiterated the rule that taxing acts, *including limitation provisions*, must be construed *liberally in favor of the taxpayer*.

From the Opinion by Mr. Justice SUTHERLAND:

"The principal question presented here, and the only one we need consider, is whether the suit, having been brought more than six years after the assessment, was barred by the provisions of section 278 quoted below.

"'(a) In the case * * * of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. * * *

"'(b) Where the assessment * * * has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax * * *.' U. S. Code Supp. title 26, secs. 1058, 1061 (26 USCA secs. 1058, 1061).

* * *

"The government contends: (1) That section 278 (d) relates only to proceedings to collect taxes *qua* taxes, and not to suits in equity to recover 'trust funds,' and that the present suit is of the latter character; but (2) that the present case is not within the provisions of that section even if a suit against the stockholders be controlled by the same rule as a proceeding against the corporation itself.

"First. The first point turns upon the question whether this is a proceeding to collect a tax, as to which it is said that the provision of section 278(d) that 'such tax may be collected * * * by a proceeding in court,' etc., refers only to a direct proceeding against

the taxpayer; and that this view is borne out by a consideration of section 280 (chapter 27, 44 Stat. 9, 61; U. S. Code Supp., title 26, sec. 1069, which prescribes a mode of procedure against transferees of the property of a taxpayer.

"The contention is that by the language of section 280 Congress has clearly differentiated between taxpayers and transferees by referring to the liability of the latter as 'the liability, at law or in equity, of a transferee of property of a taxpayer, in respect of the tax * * * imposed upon the taxpayer,' and then, apparently realizing that the limitation periods as to the collection of taxes *qua* taxes would have no application to the remedy against transferees, creating a distinct period of limitation in respect thereof.

"This view of the statute is not admissible. The plain words of sec. 280(a) are that, 'except as hereinafter in this section provided,' the liability of the transferee shall be 'assessed, collected, and paid,' subject, among other things, to the same 'provisions and limitations as in the case of a deficiency in a tax imposed by this title (including * * * the provisions authorizing * * * proceedings in court for collection * * *).' Nothing thereinafter provided in that section affects the application to the present case of these general words in respect of limitations, for, while the succeeding paragraphs contain provisions of limitation in respect of assessment, they contain none in respect of collection. It seems plain enough, without stopping to cite authority, that the present suit, though not against the corporation but against its transferees to subject assets in their hands to the payment of the tax, is in every real sense a proceeding in court to collect a tax. The tax imposed upon the corporation is the basis of the liability, whether sought to be enforced directly against the corporation or by suit against its transferees. The aim in the one case, as in the other, is to enforce a tax liability; and the effect of the language above quoted from section 280 is to read into that section, and make applicable to the transferee equally with the original taxpayer, the provision of section 278(d) in relation to the period of

limitation for the collection of a tax. Indeed, when used to connote payment of a tax, it puts no undue strain upon the word 'taxpayer' to bring within its meaning that person whose property, being impressed with a trust to that end, is subjected to the burden. Certainly it would be hard to convince such a person that he had not paid a tax.

"Second. It follows that, if by section 278(d) the period of limitation had run in favor of the corporation, it had run in favor of the transferees. The *CONTENTION OF THE GOVERNMENT* that the section does not apply under the facts of the present case depends upon the meaning of the phrase which we have italicized: 'Where the assessment * * * has been made * * * *within the statutory period of limitation properly applicable thereto*, such tax may be collected * * * by a proceeding in court * * * but only if begun (1) within six years after the assessment of the tax. * * *' *THE ARGUMENT*, in effect, *IS THIS*: In 1920 when the assessment was made, there was, and had been, no provision of law which in any form limited the time for assessing or collecting taxes, and therefore an assessment in 1920 of 1917 taxes could not fulfill the requirements of section 278(d), because, in that view, there was no 'statutory period of limitation properly applicable thereto;' and, assuming the applicability of statutes passed after 1920, the provision in these statutes is that the assessment may be made 'at any time,' and that is not a *period* of limitation within the meaning of section 278(d), for the word 'period' connotes a stated interval of time commonly thought of in terms of years, months and days (Capitalization supplied).

"The *clear intent* of section 278, as applied to the facts of the present case, was to designate *the extent of time* for the enforcement of the tax liability. Where, in a 'no return' case, an assessment, which, under paragraph (a), may be made at any time, has in fact been made, a proceeding to collect must be begun within six years thereafter; but, where there has been no assessment, the proceeding may be begun at any

time. In the present case there was an assessment, and it would not be doubted that the suit was barred at the expiration of the six-year *period* of limitation, *unless for the presence of the words italicized above.* Have these words the effect of averting *the bar?* We think not. An actual assessment having been made, it must be assumed that the government was in possession of the facts which gave rise to the liability upon which the assessment was predicated. In such case to allow *an indefinite time* for proceeding to collect the tax would be *out of harmony with the obvious policy* of the act *to promote repose* by fixing *a definite period* after assessment *within which suits* and proceedings *for the collection of taxes must* be brought". (Italics in this paragraph supplied).

"In the light of that policy, it seems reasonably clear that the saving clause, 'within the statutory period of limitation properly applicable thereto,' was inserted solely for the protection of the taxpayer—that is to say, in order to preclude collection of the tax even within six years *after* the assessment, if that assessment, when made, was barred by the applicable statutory limitation. This conclusion is confirmed, if confirmation be necessary, by the provisions of paragraph (a), which clearly contemplate that the six-year period shall apply, except where the proceeding to collect is brought 'without assessment,' in which event it may be brought 'at any time.'

"It may be that the saving clause was not strictly necessary, but was inserted *from excessive care to put the right of the taxpayer beyond dispute.* In any event, we think this is the fair interpretation of the clause, and the one which must be accepted, especially in view of the rule which requires taxing acts, including provisions of limitation embodied therein, to be construed liberally in favor of the taxpayer. Bowers v. N. Y. & Albany Co., 278 U. S. 346, 349, 47 S. Ct. 389, 71 L. Ed. 676" (Italics in this paragraph supplied).

Note particularly under "Second" above *the rejection* by this Court *of the Government's argument* that the word "period" "connotes a stated interval of time com-

monly thought of in terms of years, months and days," and this Court's *positive declaration* that the *"clear intent"* of Section 278 "was to designate the *extent* of time for the enforcement of the tax liability."

Note also this Court's use of the words "had *run*" as synonymous with the words "had *expired*" in its statement under "Second," that "It follows that, if by section 278(d) the *period* of limitation had *run* in favor of the corporation, it had *run* in favor of the transferees."

Note also the clear-cut declarations of this Court that to allow *an indefinite time* for proceeding to collect the tax "would be out of harmony with the *obvious* policy of the act *to promote repose* by fixing *a definite period after assessment* within which *suits and proceedings* for the collection of taxes *must* be brought," and that in the light *of that policy* it seems *"reasonably clear"* that the saving clause "within the statutory period of limitation properly applicable thereto" was inserted *"solely* for *the protection of the taxpayer,"* or inserted "from excessive care to put the *right* of the *taxpayer beyond dispute"*; and its final declaration that "In any event, we think this is the *fair interpretation* of the clause, and the one which *must be accepted*, especially in view of the rule which *requires taxing acts, including provisions of limitation* therein, to be construed *liberally in favor of the taxpayer.*"

Hoosac Mills Corporation et al. v. Commissioner, 75 F. (2d) 462, (C. A. 1st 1935). This case involved the liability of the petitioner as transferee of property owned by Nemasket Mill for 1919 income and profits taxes. Nemasket had transferred assets to Butler Mill in 1923, and Butler Mill in 1931 transferred the property in question as part of its assets to the petitioner. The only question was as to whether the assessment of tax was outlawed.

The Return was filed June 6, 1920, and under the statute assessment was barred by limitation after five years or on June 8, 1925. *Waivers* were filed by Nemasket which *extended* the *time for assessment* at least *until December 31, 1926.* These waivers provided that they were to remain in effect until December 31, 1926, *when they should expire except* if notice of a deficiency in tax were sent to said taxpayer by registered mail before that date and no appeal were filed with the Board of Tax Appeals, then *the December 31, 1926, date "shall be extended"* 60 days and if an appeal were filed with the Board, *then the December 31, 1926, date "shall be extended" by the number of days between the date of the mailing of said notice of deficiency and the date of the final decision of the Board.*

On February 20, 1926, the Commissioner sent a deficiency letter to Nemasket, which thereupon appealed to the Board. The parties were in agreement that the date of final decision of the Board was May 29, 1930.

From the Opinion, per MORTON, *C. J.*:

> "Under the waivers the appeal tolled the statute of limitation until final decision by the Board. This resulted in *an extension of the time* within which the assessment might be made for 4 years, 3 months, 9 days, or to April 9, 1931."

The tax was assessed against Nemasket on July 26, 1930, (which was within less than 60 days after the date of the final decision by the Board on May 29, 1930) even though *under the extension granted by the waiver* the time for assessment did not expire until April 9, 1931.

Nothing further was done in the matter until May 18, 1932, a delay of nearly two years, when the Commissioner sent a "sixty-day" letter or notice of deficiency to Hoosac Mills as transferee, from which the appeal involved in the present case was taken to the Board of Tax Appeals.

As the law then stood, where property of a person liable for a tax was transferred subsequent to the accrual of the liability, the tax might be assessed against the transferee at any time up to one year after the final date on which it could be assessed against the original owner, or in this case up to April 9, 1932. The parties agreed that the petitioner was liable if the statute of limitation has not barred the enforcement of the liability against it.

The question before the Court of Appeals was "*whether the right of assessment against* the *petitioner had been barred on or before May 18, 1932*," the date of the notice of deficiency sent to petitioner as transferee.

From the Opinion:

> "But while the waivers were in force, the Revenue Act of 1926 became effective. A question at once arises *whether Congress by statute could effect the plain language of the waivers to the extent for which the government contends.* It is *unnecessary to decide it* because *we are unable to agree with the Commissioner's interpretation of the statute.* * * *" (Italics supplied).

The 1926 Act provided in section 274 (a) that the Commissioner should be prohibited from assessing or collecting any tax in case of an appeal "until the decision of the Board of Tax Appeals became final", though he could still make an emergency assessment under section 279. It was further provided in section 277 (b), in effect, that "the period" provided in that section, or under section 274 (a), or *under section 278*, for *assessing a tax*, should "in case of an appeal, *be suspended until 60 days after the decision* of the Board *became final.*" (The tax against Nemasket was assessed within this 60-day period.)

The *government contended* that these provisions "have *the effect of suspending the waivers* (signed by Nemasket)

so far as they relate *to the tolling of the statute,* and *of extending the time* within which the *tax might be assessed by an additional period as long as that during which the waivers were thus suspended,*" or, in other words, that this period of "suspension", 4 years, 3 months, and 9 days, was *to be added* "to the date when the decision of the Board became final, (May 29, 1930) and 60 days thereafter (July 29, 1930), or until November 6, 1934, or against the petitioner until November 6, 1935."

As an alternative the *government urged* that at least the period of 10 months and 11 days between February 20, 1926, when the deficiency letter was sent, and December 31, 1926, *to which date the waiver by its terms unquestionably extended the period for assessment, should be added* to *the statutory period* within which the tax might be assessed under *section 277 (b) of the 1926 Act*, which under its first contention it said was 60 days after the Board's decision became final on July 29, 1930, thus carrying the time for assessment against Nemasket to June 9, 1931; and to June 9, 1932, as against petitioner as transferee, which latter date would bring the deficiency letter to petitioner of May 18, 1932, within time.

The Court stated that *under the government contention* "the case turns on whether *sections 274 (a), 277 (b) and 278* of the *1926 Act* operate to extend the period for assessment beyond *May 18, 1932.*"

From the Opinion:

> "* * * When Congress provided in section 277. (b) of the 1926 Act that the *statute of limitations* was *suspended until 60 days after the decision of the Board became final*, it does not follow that the Commissioner could take no action during that 60 days. *The law authorizing the assessment of a tax was not suspended during that 60 days' period. It* merely *gave* the *Com-*

missioner time to assess a tax *in case a waiver had not extended the time for assessment beyond the date when the decision of the Board became final. If it meant* that *the waiver was suspended* until *the expiration of the 60-day period after the decision of the Board* became final, *and* that *any unexpired part of the waiver period was then added*, the addition of 4 years, 3 months, and 9 days *is the only logical construction; but such a construction would be absurd:*

"We *think* Congress, when it provided in section *277 (b)*, of the *1926 Act*, that *the running* of the statute of limitations *was suspended* during the period in which the Commissioner was prohibited from assessing a deficiency tax, and for 60 days thereafter, *did not thereby intend to extend the time for assessing a deficiency* tax *beyond the 60 days therein mentioned*, by adding the unexpired period of a waiver, if any, after the notice of a deficiency tax was mailed; *but merely to suspend the tolling of the statute of limitations* provided in *sections 274 (a), 277, and 278 for 60 days after the decision of the Board became final. Ample time to assess* a deficiency tax *is given by this construction, if the period as extended by a waiver is insufficient* in any case. The Commissioner did not act in this case *within the time permitted by the statute or the waiver*, and the tax against this petitioner was barred" (Italics supplied).

When the House of Representatives first considered Section 277(b) in the Bill of 1924 (Add. 10c), it stated that the purpose of Section 277(b) was "to remove the necessity for the present practice of the Treasury Department in assessing without opportunity for hearing * * * a deficiency *discovered just before the expiration* of the statutory *period* for assessment" and "By extending the *period* in which an assessment may be made, as is here provided, the taxpayer may be given the opportunity of a hearing without jeopardizing the assessment and collection of the tax by the Department." A similar reference to Section 277(b) of the said Bill was made by the Committee on Finance

Report thereon (Add. 10c). When the provisions of *Section 277(b)* of *the 1924 Act* were being changed and written into the *Revenue Bill of 1926*, the Committee on Finance Report thereon specifically stated that it recommended that "a provision be added that *in no event* shall the Commissioner have *less than* 60 days after the decision of the Board has become final *in which to make the assessment*, and also that in case where no petition is filed with the Board, he shall have *at least* 90 days after the mailing of the notice *in which to make the assessment*" (Add. C. A. 15c).

When it is kept in mind that what Congress was dealing with in Section 277(b) from the outset was a deficiency *discovered just before* the *expiration* of the *statutory period or time* for assessment, which necessarily had to be a *particular* date, how can it logically be said that Congress was dealing with anything other than an *expiration date in time* and not *a period of time* when it provided in *Section 277(b)* of the *1926 Act* that "The running of the statute of limitations * * * shall * * * be suspended * * *?" It further showed this most clearly in *Section 1130* of the *1926 Act* when it provided, "In determining *the running of any period of limitation* in respect of distraint, the distraint shall be held to have been begun * * * *on the date* * * *." And the Commissioner of Internal Revenue gave full recognition thereto in Article 1272 of his Regulations 69 (Add. C. A. 31c).

This is still further clearly shown when we turn to the Report submitted by the Committee on Ways and Means of the House on the *Revenue Bill of 1928* when it was dealing with *Section 277* of that Bill *which was similar* to *Section 277(b)* of the *1926 Act*. In its Report (Add. C. A.

24c), in dealing with that Section, under the heading "Suspension of running of statute," it specifically stated:

> "*Under existing law* and under the provisions of the Bill, *the running* of the *limitation period* on assessments is suspended while an appeal is pending before the Board * * * it is specifically provided in Section 277 that the limitation period shall be suspended if no proceeding is placed on the docket of the Board, until the decision of the Board in respect thereof becomes final and for sixty days thereafter."

And then after considering various situations arising on deficiencies before the Board, the Report further states:

> "*Accordingly, in all the foregoing cases, the limitation on assessment* is *definitely suspended* by section 277 until the decision of the Board has become final and for sixty days thereafter."

A reading and consideration of the excerpts from the various Congressional Reports on the *Revenue Bills of 1924, 1926 and 1928* set forth hereinabove and in the Addendum plainly shows that when providing in *Section 277 (b)* of the *Revenue Bill of 1926* and *Section 277* of the *Revenue Bill of 1928* that *the running of the statute of limitations shall be suspended*, Congress had reference to the *suspension* of *a date* in the *extent of time* and not to the *extension* of a *portion* or *part* of a *period of time*. It is also plainly seen throughout the various Reports above referred to the use by the Congressional Committees of the word *"run"* in connection with *the statute of limitations* as synonymous with *"expire"*. For example, in House Report No. 179 on the 1924 Bill, in dealing with Section 278(d) thereof, the Report stated (Add. 9c-10c), "The purpose of a limitation upon assessment is to assure the taxpayer that, after the *period* has *run*, no assessment shall be made and no taxes may be collected

from him." To further illustrate: In dealing with Section 274 of the *Revenue Bill of 1934* the Report of the House Ways and Means Committee, in providing for immediate assessment in cases of bankruptcy or receivership regardless of the restrictions imposed by section 272(a), stated that there was no specific provision in the law requiring a trustee or receiver "to give notice to the Commissioner of his appointment, as a result of which *the statute of limitations* frequently *runs* against the Government" and to correct this situation "the *running* of the statute *is suspended* for a period of 30 days after the date of the receipt of the notice by the Commissioner." How can anyone logically say the Committee meant anything other than "expires" when it used the word "runs" immediately above? Then, how can anyone logically say the Committee meant anything other than "the *expiration* of the statute * * * shall * * * be suspended * * *" when it stated "the *running* of the statute is suspended * * *?" We submit, no one can! But here both the District Court and the Court of Appeals, illogically and in error, we submit, concluded (App. 69), "The term 'running' is not synonymous with 'expiration', and will be ascribed a meaning that connotes the passing of time * * *", directly contrary to this Court's use in *Updike, supra*, of the words "had run" as synonymous with "had expired" and that the "clear intent" of the limitation statute there involved "was to designate the *extent of time* for the enforcement of the tax liability." (Italics supplied.)

Conclusion

Based upon all the facts herein and the law applicable thereto, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ANDREW L. WEIL,
The Lawyers Building,
Pittsburgh, Pa. 15219,

R. J. CLEARY,
North American Rockwell Bldg.,
Pittsburgh, Pa. 15222,

Attorneys for Alvin C. Moyer, Petitioner

May, 1970.

APPENDIX

Opinions Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17922.

UNITED STATES OF AMERICA,

v.

ALVIN C. MOYER and JACOB E. MOYER, d/b/a MOYER BROTHERS,

ALVIN C. MOYER,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued October 23, 1969

Before Kalodner, Staley and Freedman, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 9, 1970.)

PER CURIAM

The District Court held that the Government's action to reduce to judgment certain taxes, penalties and interest

was not barred by the statute of limitations because the running of the limitations period was suspended by the appellant taxpayer's submission of an offer in compromise for the period during which the offer was pending and for one year thereafter. This appeal followed.

On review of the record we find no error for the reasons so well stated in the Memprandum Opinion of Judge Sorg.

The Order of the District Court entering judgment in favor of the Government will be affirmed.

A True Copy:

Teste:

THOMAS F. QUINN,
Clerk of the United States Court of Appeals for the Third Circuit.

Judgment

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,922.

UNITED STATES OF AMERICA,
vs.
ALVIN C. MOYER and JACOB E. MOYER,
d/b/a MOYER BROTHERS,
ALVIN C. MOYER,
Appellant.

(D. C. Civil Action No. 67-406.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: Kalodner, Staley and Freedman, *Circuit Judges.*

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed February 13, 1969, be, and the same is hereby affirmed, with costs taxed in favor of appellee.

Attest:

THOMAS F. QUINN,
Clerk.

January 9, 1970.

Memorandum

(Filed June 6, 1968.)

The plaintiff, United States of America, has filed a Motion for Summary Judgment in this civil action to reduce to personal judgment certain taxes, penalties and interest assessed by the United States for the years 1957, 1958, 1959 and 1960.

There is no dispute, and counsel have stipulated, that the taxes involved, consisting of withholding, social security and federal unemployment taxes, were timely assessed in the correct amounts. It is also stipulated that the sole issue for determination here is whether this suit is barred by the Tax Statute of Limitations for Collection* *vel non* as of July 16, 1966. On that date, Alvin C. Moyer, one of the above named defendants, executed the first of two tax collection waivers, the apparent effects of which were to extend the time for payment of the taxes in issue to March 31, 1967, one day after this action was commenced. It is agreed that these apparent extensions would not be effective if the statutory time for collection had already expired at the time the first of the aforesaid waivers was executed, *i.e.*, July 16, 1966.

On November 22, 1957, the District Director of Internal Revenue made the first of twelve assessments for the years in question.**. The last assessment was made on June 3,

*26 U. S. C. A., § 6502(a)(1) and (2): (a) Length of period.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun— (1) within 6 years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period. . . .

**The type of tax, taxable period, amounts assessed, assessment dates and unpaid assessed balances appear, as stipulated to, at paragraph V of the amended complaint.

1960. On June 21, 1960, Moyer Brothers, over the signature of A. C. Moyer, partner, submitted an offer in compromise to the Internal Revenue Service, which contained the following language:

> 6. The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for one year thereafter.

By letter dated March 20, 1962, one year, eight months and twenty-nine days later this offer in compromise was rejected.

It is contended by the United States that these arrangements effected an extension of the statutory period for collection to August 21, 1966, computed as follows:

Date of assessment	November 22, 1957
Expiration of normal 6-year statute of limitations	November 22, 1963
Length of time during which offer in compromise was pending (1 year, 8 months, 29 days) and one year thereafter to be added to above expiration of statute of limitations	August 21, 1966

The defendants contend, however, that paragraph No. 6 of the offer in compromise above quoted should not be interpreted in such a manner as to extend the statutory period of limitations beyond six years, unless the normal 6-year period from date of assessment expires during the pendency of the offer in compromise, and that the waiver,

therefore, could under no circumstances be effective in this case beyond March 20, 1963, the date of rejection of the offer, and a date well within the normal 6-year statutory period, which expired November 22, 1963. By the same reasoning, the time for collection of each of the subsequent assessments would expire prior to July 16, 1966, thus rendering the "Tax Collection Waiver" executed on that date ineffective, because, by the terms of this waiver, it was to take effect "only provided the Statute of Limitations on such rights of collection has not expired prior to the date hereof." Defendants also contend that even if the computations of the United States are correct, the rejection of the offer in compromise nullified any waiver of the statute of limitations contained in the offers.

The latter contention is wholly without merit, for the waiver of the statute of limitations by the defendants was accepted by the United States and was unaffected by the rejection of the offer in compromise. *U. S. v. Brown*, 225 F. Supp. 414 (1964), affd. 337 F. 2d 858 (3 Cir. 1964).

As to the taxpayer's contention that a waiver does not extend the statutory period of limitations beyond six years unless the expiration date of the 6-year period occurs during the pendency of the offer in compromise, the court in *U. S. v. Harner*, 101 F. 2d 161 (8 Cir. 1939), interpreting the same language of a waiver included in an offer of compromise, held that the effect of such waiver is to suspend the *running* of the statutory period in the sense that the statute of limitations was to be tolled according to a formula established by the terms of the waiver. This court agrees with such an interpretation, for, indeed, it is the only one which could give effect to the express terms of the accepted waiver, including, as they do, a suspension for a determinable period. The defendants' interpretation

requires rejection of the express language of the waiver—namely, that there should be a "suspension" of the *running*, not the *expiration*, of the statutory period for collection for the time during which the offer in compromise was being considered, plus one year. The term "running" is not synonymous with "expiration," and will be ascribed a meaning that connotes the passing of time during which a defense to collection procedures matures. It seems reasonable that the period of a statute of limitations should begin to "run" some time before it becomes a defense, and that the time which can be counted in determining whether or not such a defense has accrued, should be regarded as the time during which the period of limitation was running. This interpretation is implied in the treatment of statute of limitations suspensions involving a defendant's absence from a state. "It has also been decided that in order that, after a debtor has moved from the state, the statute of limitations *may run* in his behalf *during a temporary* return . . . he is entitled to credit for all the time spent in the state." *Am. Jur.* 34 § 227, p. 184. (Emphasis added.)

The terms of the waiver are clearly susceptible to only one interpretation, giving validity to the plaintiff's method of computing the period for collection, and this action is timely brought under the provisions of the 26 *U. S. C. A.*, § 6502(a)(2), *supra*.

Plaintiff's Motion for Summary Judgment will be granted.

s/ HERBERT P. SORG,
D. J.

Dated: June 6, 1968.

Order

AND NOW, this 6th day of June, 1968, for the reasons set forth in the foregoing Memorandum, plaintiff's Motion for Summary Judgment is hereby granted, and judgment will be entered in an amount to be calculated by the parties pursuant to their stipulation.

s/ HERBERT P. SORG,
D. J.

* * *

Judgment Order

(Filed February 13, 1969.)

In accordance with the Court's Order of June 6, 1968, the United States has filed an affidavit of the District Director of Internal Revenue, Pittsburgh, Pennsylvania, as to the total amount of the taxes, penalties and interest involved in this proceeding with interest computed to July 6, 1968, and the defendants have agreed that the District Director's computation is consistent with the stipulation previously filed by the parties.

Pursuant to, and in accordance with, the Court's memorandum, dated June 6, 1968, and the Conclusions of Law contained therein, it is hereby

ADJUDGED, ORDERED, AND DECREED, that the plaintff, the United States of America, is entitled to a judgment against defendants, Alvin C. Moyer and Jacob E. Moyer, jointly and severally, in the amount of $624,473.09 and costs with

interest on the judgment from June 6, 1968, and judgment is granted accordingly.

Enter: February 13, 1969.

(Sgd.) HERBERT P. SORG,
United States District Judge.

The computation of the amount of this judgment is in accordance with the stipulation that has been filed by the parties. The signing of this so-called Judgment Order by counsel for defendant Alvin C. Moyer is not to be taken as an admission on the part of such defendant either that the statements as to facts in the Court's Memorandum dated June 6, 1968 in their entirety reflect facts (See letter of August 5, 1968, from R. J. Cleary to Hon. Herbert P. Sorg, copies of which letter were sent to counsel for the parties) or that the ultimate conclusion drawn by the Court is such Memorandum is in accordance with law.

ALVIN C. MOYER,

By: (Sgd.) R. J. CLEARY,
Counsel.

JACOB E. MOYER,

By: (Sgd.) HUBERT I. TEITELBAUM,
Counsel.

UNITED STATES OF AMERICA,

By: (Sgd.) GUSTAVE DIAMOND,
United States Attorney.

Statutes and Regulations

Section 6502, COLLECTION AFTER ASSESSMENT, of the *Internal Revenue Code of 1954*, as originally enacted, provided in part:

> "(a) Length of Period.—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—
>
> "(1) within 6 years after the assessment of the tax, or
>
> "(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).
>
> The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

Regulations 301.6502-1 provided in part:

> "Collection after assessment—(a) Length of period —(1) General rule. In any case in which a tax has been assessed within the statutory period of limitation properly applicable thereto, a proceeding in court to collect such tax may be begun, or levy for the collection of such tax may be made, within 6 years after the assessment thereof.
>
> "(2) Extension by agreement. (i) The 6-year period of limitation on collection after assessment of any tax may, prior to the expiration thereof, be extended for any period of time agreed upon in writing by the taxpayer and the district director. The extension shall become effective upon execution of the agreement by both the taxpayer and the district director."

Section 6503, SUSPENSION OF RUNNING OF PERIOD OF LIMITATION, of the Code of 1954, as originally enacted, provided in part:

"(a) Issuance of Statutory Notice of Deficiency.—

"(1) General Rule.—The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, and gift taxes), shall (after the mailing of a notice under section 6212(a)) be suspended for the period during which the Secretary or his delegate is prohibited from making the assessment or from collecting by levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter."

Regulations 301.6503(a)-1 provided in part:

"Suspension of running of period of limitation; issuance of statutory notice of deficiency—(a) General rule. Upon the mailing of a notice of deficiency for income, estate, or gift tax under the provisions of section 6212, the period of limitation on assessment and collection of any deficiency is suspended for 90 days if the notice of deficiency is addressed to a person within the States of the Union and the District of Columbia, or 150 days if such notice is addressed to a person outside the States of the Union and the District of Columbia (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th or 150th day), plus an additional 60 days thereafter in either case. If a proceeding in respect of the deficiency is placed on the docket of the Tax Court, the period of limitations is suspended until the decision of the Tax Court becomes final, and for an additional 60 days thereafter. If a notice of deficiency is mailed to a taxpayer within the period of limitation and the taxpayer does not appeal therefrom to the Tax Court, the notice of deficiency so given does not suspend the

running of the period of limitation with respect to any additional deficiency shown to be due in a subsequent notice.

"Example. A taxpayer filed a return for the calendar year 1954 on April 15, 1955; the notice of deficiency was mailed to him (at an address within the United States) on April 15, 1958; and he filed a petition with the Tax Court on July 14, 1958. The decision of the Tax Court became final on November 6, 1959. The running of the period of limitation for assessment is suspended from April 15, 1958 to January 5, 1960, which date is 60 days after the date (November 6, 1959) on which the decision became final. If in this example the taxpayer had failed to file a petition with the Tax Court, the running of the period of limitation for assessment would then be suspended from April 15, 1958 (the date of notice), to September 12, 1958 (that is, for the 90-day period in which he could file a petition with the Tax Court, and for 60 days thereafter)."

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1583

ALVIN C. MOYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 66–69) is not officially reported. The opinion of the court of appeals (Pet. App. 63–64) is reported at 420 F. 2d 375.

JURISDICTION

The judgment of the court of appeals was entered on January 9, 1970 (Pet. App. 65). By order dated March 25, 1970, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 15, 1970. The petition was filed on May 15, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government's suit for collection of assessed taxes, penalties and interest was timely filed.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6502. Collection after assessment.

(a) *Length of Period.*—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

* * * * *

STATEMENT

The United States brought this civil action against petitioner to reduce to personal judgment certain taxes, penalties and interest which were assessed for the years 1957 through 1960 (R. 4a–7a, 11a–12a).[1] The parties stipulated (R. 27a) that the taxes were timely assessed in the correct amounts. The first of

[1] "R." references are to the record appendix originally filed in the court of appeals and now on file in this Court.

the twelve assessments was made on November 22, 1957, and the last on June 3, 1960 (R. 27a–28a). On June 21, 1960, petitioner submitted an offer in compromise of these assessments to the Internal Revenue Service (R. 14a, 17a–18a, 28a). That offer included the following provision (R. 17a, 28a):

> 6. The undersigned proponent waives the benefit of any statute of limitations applicable to the assessment and/or collection of the liability sought to be compromised, and agrees to the suspension of the running of the statutory period of limitations on assessment and/or collection for the period during which this offer is pending, or the period during which any installment remains unpaid, and for 1 year thereafter.

On March 20, 1962—one year, eight months, and twenty-seven days after the offer was submitted[2]—the Internal Revenue Service rejected the offer (R. 19a, 28a).

On July 16, 1966, petitioner executed the first of two tax collection waivers of the statute of limitations, the effects of which were to extend the time for collection of the taxes assessed to March 31, 1967, one day after this action was instituted (R. 15a, 20a, 27a). The parties stipulated (R. 15a–16a, 27a) that the sole issue was whether, as of July 16, 1966, this suit was barred by the statute of limitations for

[2] The district court and counsel erred by two days in computing the time during which the offer in compromise was outstanding, arriving at a figure of one year, eight months, and twenty-nine days (R. 28a; Pet. App. 68). This error was not corrected by the court of appeals, but has no effect on the outcome.

collection of tax, which is prescribed in Section 6502(a) of the Internal Revenue Code. It was agreed (R. 15a, 27a) that if the time for collection expired prior to July 16, 1966, the waivers executed by petitioner would not be binding.

The district court held (Pet. App. 66, 69) that the time for collection had not expired as of July 16, 1966, and accordingly granted the government's motion for summary judgment. It reasoned as follows (Pet. App. 67): but for the offer in compromise, the statute of limitations on the earliest assessment would have run, pursuant to Section 6502(a)(1), on November 22, 1963, six years after the date of that assessment; the effect of the offer in compromise, which was executed pursuant to Section 6502(a)(2), was to extend the six-year statutory period for a total of two years, eight months and twenty-seven days, until August 18, 1966; thus, collection of the earliest assessment—and, necessarily, the later assessments as well—was not barred on July 16, 1966, the date on which petitioner executed the first of the two waivers. On appeal, the Third Circuit affirmed, *per curiam* (Pet. App. 63–64).

ARGUMENT

The decision below is correct. There is no conflict or any other reason for further review by this Court.

I. When petitioner made his offer in compromise, he agreed to "the suspension of the running of the statutory period of limitations" on collection for the period during which the offer was pending, and one year thereafter. The sole issue here is the meaning of the quoted language.

Petitioner contends (Pet. 61) that the language should be interpreted to mean that the assessed tax may be collected at any time during the pendency, or within one year after rejection, of the offer in compromise. Thus, under his theory, the offer served only to permit collection of the tax until March 20, 1963. Since the normal six-year period as to even the final assessment would have expired on June 3, 1966, petitioner argues that collection of all twelve assessments was barred on July 16, 1966, when the first of the waivers was executed.

This argument is without merit. As the district court pointed out (Pet. App. 68–69), the offer in compromise does not say that there should be a "suspension of the expiration of the statutory period of limitations" on collection while the offer is pending and for one year thereafter. It says that there is to be a "suspension of the running of the statutory period." The critical language has uniformly been interpreted to mean that the statute is tolled during the specified period, and not merely that the time for collection is extended if it otherwise would run. See, *e.g.*, *United States* v. *Markowitz*, 34 F. Supp. 827, 829–830 (N.D. Calif.); *United States* v. *Harner*, 101 F. 2d 161 (C.A. 8); *Bank of Commerce & Trust Co.* v. *United States*, 32 F. Supp. 942, 946–947 (W.D. Tenn.), affirmed *per curiam*, 124 F. 2d 187 (C.A. 6); *United States* v. *Shanman*, 216 F. Supp. 408, 410–411 (E.D.S.C.); *United States* v. *Bosk*, 180 F. Supp. 869 873–874 (S.D. Fla.); *United States* v. *Mortell*, 248

F. Supp. 706 (N.D. Ill.). There is no reason for departing from this uniform interpretation here.

2. *United States* v. *Updike*, 281 U.S. 489, and *Hoosac Mills Corp.* v. *Commissioner*, 75 F. 2d 462 (C.A. 1), relied upon by petitioner (Pet. 49–58), are not in point. In neither of these cases involving the tax liability of transferees was the language of the pertinent statutory provisions similar to that of the offer in compromise here in dispute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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